Petition

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No. _____

Supreme Court of the United States

October Term, 1981

Montana Wilderness Association,
Nine Quarter Circle Ranch, and
The Wilderness Society,

Petitioners,

—vs—

United States Forest Service;
John McGuire, its Chief; Lewis
Hawkes, Gallatin National Forest
Supervisor; United States Fish
and Wildlife Service; Harvey
Willoughby, its Regional
Director; Burlington Northern,
Inc., a Delaware Corporation;
Bob Bergland, Secretary of
Agriculture,

Respondents,

and

The National Forest Products
Association,

Intervening Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

Petition For Writ of Certiorari

JAMES H. GOETZ, ESQ.
Goetz, Madden & Dunn, P.C.
P. O. Box 1322
Bozeman, Montana 59715
Telephone: (406) 587-0618
Attorneys for Petitioners

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.	i
LIST OF ALL PARTIES IN THE COURT. . . .	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iii
OPINIONS BELOW.	vii
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT MAY BE INVOKED.	vii
STATUTE INVOLVED.	vii
STATEMENT OF THE CASE	1
ARGUMENT.	8
I. THE ERRONEOUS HOLDING OF THE NINTH CIRCUIT, THAT THE ACCESS PROVISION OF THE ALASKA LANDS ACT APPLIES TO FEDERAL LANDS OUTSIDE ALASKA, HAS NATIONWIDE IMPLICATIONS BECAUSE IT RENDERS THE FEDERAL LAND MANAGEMENT AGENCIES THROUGHOUT THE NATION POWERLESS TO DENY PRIVATE ACCESS, EVEN WHERE SUCH ACCESS WOULD HAVE DEVASTATING CONSEQUENCES TO THE FEDERAL LANDS	8
II. THIS CASE PRESENTS THE CONVERSE OF THE ISSUE DECIDED IN LEO SHEEP CO. v. UNITED STATES, 440 U.S. 668 (1979), NAMELY WHETHER A PRIVATE INHOLDER HAS AN ENTITLEMENT TO CROSS FEDERAL LANDS TO REACH PRIVATE INHOLDINGS. THE ISSUE PRESENTED HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	21
III. THE ISSUE OF WHETHER AN EASEMENT BY NECESSITY MAY BE APPLIED TO FEDERAL LANDS IS AN IMPORTANT ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE,	

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 1323(a) of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, which provides that the Secretary of Agriculture shall provide the owners of non-federally owned land within the boundaries of the National Forest System adequate access, applies to United States Forest Service lands outside the State of Alaska.

2. Whether the Northern Pacific land grants of 1864 and 1870 provide Burlington Northern, as successor to Northern Pacific R.R. Co., an implied easement to cross Federal lands to reach its private inholdings.

3. Whether the common law doctrine of easement by necessity applies to provide private access across Federal lands set aside for wilderness study.

LIST OF ALL PARTIES IN THE COURT BELOW

All parties involved in the Court below are listed on the caption. However, the individually-named Federal defendants no longer serve in the capacities listed. In the event that the Petition for Certiorari is granted, Petitioners will file a motion to substitute the following as respondents:

1. Max Peterson in place of John McGuire, as Chief of the United States Forest Service;

2. John Drake in place of Lewis Hawkes, Gallatin National Forest Supervisor;

3. Donald Minnich in place of Harvey Willoughby, as Regional Director, U. S. Fish and Wildlife Service; and

4. John R. Block, in place of Bob Bergland, Secretary of Agriculture.

PAGE

SETTLED BY THIS COURT. 26

IV. CONCLUSION 28

APPENDICES

A. Opinion of Court of Appeals, Ninth Circuit, dated May 14, 1981. . . . . A-1

B. Opinion of Court of Appeals, Ninth Circuit, dated August 19, 1981. . . . . B-1

TABLE OF AUTHORITIES

CASES

Chrysler Corp. v. Brown, 441 U.S. 281 (1979). 19

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 103 (1980) . . .18-20

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 13,14,21,22,23,28

Montana Wilderness Association et al. v. United States Forest SErvice et. al., 496 F. Supp. 880 (D. Mont., 1980) . . . . . 7, et passim

Montana Wilderness Association et al. v. United States Forest Service et al. (9th Cir., 1981) Opinion, May 14, 1981 (Appendix A). . . . . 7, et passim

Morton v. Mancari, 417 U.S. 535 (1974). . . . 12

PAGE

CASES continued:

Posadas v. National City Bank, 296 U.S. 497 (1936) 12

Superior Oil Co. v. United States, 353 F.2d 34 (9th Circ., 1965) . . . 27

United States v. Dunn, 478 F.2d 443 (9th Cir., 1973). 27

United States v. Northern Pacific R. Co., 311 U.S. 317 (1940). 24

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 19

United States v. Price, 361 U.S. 304 (1960). 18

STATUTES

Alaska National Interest Lands Act, Pub. L. No. 96-487, 94 Stat. 2371. Pages 1,7,8,12,15,16,18,19,20,23

Colorado Wilderness Act, Pub. L. No. 96-560, 94 Stat. 3265, (1980). 17,20

Federal Rules of Civil Procedure, Rule 54 (b). 6

Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243. 2

Northern Pacific Land Grant of 1864, 13 Stat. 365 3,4,5,6,12

Northern Pacific Land Grant of 1870, 15 Stat. 378 3,4,5,6,12

Rules, Supreme Court of the United States, Rule 17(c) 15

Union Pacific Land Grant of 1862. . 21

STATUTES continued: PAGE

5 U.S.C. sec. 701-706. 4

16 U.S.C. sec. 478. 3,4,5,6,12

16 U.S.C. sec. 532. 10,12

16 U.S.C. sec. 1134 et seq. 11,12

16 U.S.C. sec. 4601-22 (Supp. V. 1970). 10

28 U.S.C. sec. 1291 6

28 U.S.C. sec. 1331(a). 4

28 U.S.C. sec. 1361 4

42 U.S.C. sec. 1983 4

43 U.S.C. sec. 1701 et seq. 10

MISCELLANEOUS

Coggins and Wilkinson, Federal Public Land and Resources Law, 1980 13,24

126 Cong. Rec. H 10549, (Daily ed., Nov. 12, 1980) 20

Congressional Record - Senate, (March 1, 1967). 14

126 Cong. Rec. S 1477, (Daily ed., Nov. 20, 1980) 20

Gates, P., History of Public Land Law Development, Wash., D. C., 1968. . . 24

House Report No. 1920, (Sept. 30, 1964) 8,9

One-Third of the Nation's Land, Report of the Public Land Law Review Commission, (1970) 10,13

42 Op. Att'y Gen. No. 26, (1980).4,5,11,26,28

MISCELLANEOUS continued: PAGE

42 Op. Att'y Gen. No. 127, (1962). . . 14

43 Op. Att'y Gen. No. 7, (1962). . . . 26

R. Powell, Real Property, 1979 27

Senate Report, No. 1174, (July 8, 1964) 8,9,14

Thompson, Real Property, 1961. 26

OPINIONS BELOW

The Opinion of the District Court is reported at 496 F. Supp. 880 (D. Mont. 1980). The first opinion of the Court of Appeals, May 14, 1981, is unreported. It is reproduced in the Appendix to the present Petition for Certiorari, A-1 -- A-33. The Opinion on Rehearing of the Court of Appeals, August 19, 1981, is not yet reported. It is reproduced in the Appendix to the present Petition for Certiorari, B-1 -- B-25.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is premised on 28 U.S.C. § 1254. The decree of the Court of Appeals sought to be reviewed was entered on August 19, 1981

STATUTE INVOLVED

Section 1323 of the Alaska National Interest Lands Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) is as follows:

(a) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to non-federally-owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

(b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to non-federally-owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.

STATEMENT OF THE CASE

Review is sought of the decision of the Court of Appeals that Burlington Northern, Inc., (BN) has a right, under Sec. 1323(a) of the Alaska National Interest Lands Act (Alaska Lands Act) Pub. L. No. 96-487, 94 Stat. 2371, to cross lands of the United States as an access route to the company's inholdings within the boundaries of the Gallatin National Forest. At stake is the effect such access would have on the wilderness potential of the public lands.

The BN access roads, proposed for logging, are located in the Gallatin National Forest in Southwestern Montana in the drainages of Buck Creek and Yellow Mules Creeks which are approximately 48-55 miles southwest of Bozeman, Montana. The National Forest sections which are the subject of the proposed access roads are intermingled with sections owned by Burlington Northern, Inc. in a "checkerboard" land ownership pattern.

The Petitioners (Plaintiffs-Appellants below) are the Montana Wilderness Association, The Wilderness Soceity and the Nine Quarter Circle Ranch. The Nine Quarter Ranch is a dude ranch near the Buck Creek

drainage, whose operations would be severely damaged if the logging roads were allowed (CR 2, p. 3). The Montana Wilderness Association (hereinafter "MWA") and The Wilderness Society (hereinafter "TWS") are, respectively, State and National non-profit corporations which are dedicated to the creation and preservation of Wilderness Areas. (CR 2, pp. 2,3). The Respondents are the United States Forest Service (USFS), various Federal officials who are responsible for the decisions challenged in this case, and BN.

The Buck Creek and Yellow Mules drainages are in the highly scenic Gallatin Canyon area of the Gallatin National Forest. (See Exhibit 1, map, p. 2). Most of the Federal lands affected by BN's access proposal are within the "Taylor-Hilgard Wilderness Study Area." (CR 8, Int. #9). This area is presently protected by the Montana Wilderness Study Act of 1977, P.L. 95-150, 95th Cong., 91 Stat. 1243, which requires that the suitability of the lands for wilderness designation be reviewed and that findings be submitted to the President within five years. During the review period, the lands are required by the Act to be maintained to preserve their "presently existing wilderness character." The

proposed logging and road-building activities will, as recognized in the Final Environmental Statement, disqualify the areas for wilderness consideration. (Exhibit 1, p. 74).

The involved lands were previously held by Burlington Northern's predecessor, Northern Pacific Railway Co. (hereinafter "NP"), which obtained patents from the United States under the Northern Pacific Railroad land grants, 13 Stat. 365 (1864); 15 Stat. 378 (1870).

The application for a special use permit to cross U. S. lands to reach BN lands in the Buck Creek and Yellow Mules drainages was filed with the Gallatin National Forest on May 6, 1975. (Exhibit 1, p. 1). An environmental impact statement was released by the FS in August, 1977. (Exhibit 1). Although the environmental statement indicated that serious environmental consequences would result, the FS stated that it would grant the special use permit to BN, largely because the FS believed, by virtue of 16 U.S.C. 478, that it lacked discretion to deny access. (Exhibit 1, p. 54). After rejecting an administrative appeal, the FS issued the permit to BN and the present

suit was immediately filed.[1/]

Thereafter the USFS suspended BN's permit because of the uncertainty of the U. S. Justice Department regarding the FS interpretation that 16 U.S.C. § 478 left no discretion to deny access.

On June 23, 1980, U. S. Attorney General Civiletti issued an opinion which considered the following three theories upon which BN claimed an absolute right of access:

1. The USFS has a statutory duty to grant access under the Forest Service Organic Administration Act of 1897, 16 U.S.C. 478;

2. BN has an easement by necessity across the Federal lands;

and,

3. There is an implied easement, based on the Congressional intent when the Northern Pacific Railroad land grants were made, by which it was contemplated that NPRR (now BN) would have a right of access across the Federal lands.

42 Op. Att'y Gen. No. 26 (1980) p. 1. The Attorney General rejected the first two theories listed above,

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[1/] Jurisdiction in the U. S. District Court was based on the Administrative Procedure Act, 5 U.S.C. 701-706; 28 U.S.C. 1331(a); 28 U.S.C. 1361, & 42 U.S.C. 1983.

finding that easements by necessity do not apply to the government and that the statutory duty to grant access under 16 U.S.C. 478 applies only to "actual settlers." Id., p. 2.

The third contention (implied easement based on the intent of Congress) was left open by the Attorney General, as contingent on the "circumstances surrounding the grant, including the purpose for which it is made." (Op. Att'y Gen., p. 2 (June, 1980) Id., p. 2. The circumstances surrounding the NP land grants were not specifically addressed by the Attorney General in the June 23 Opinion.

The USFS on July 30, 1980, re-issued the special use permit to BN after concluding the BN had an implied right of access based on Congressional intent (Exhibit 7). Thereafter a temporary restraining order was issued by the District Court and the matter was considered in a joint summary judgment-preliminary injunction hearing. The District Court entered summary judgment in favor of BN and the USFS, finding that BN has an easement by necessity to cross Federal lands, and that BN has an implied easement to cross

Federal lands based on the NP land grants.[2/] The temporary restraining order was dissolved and a preliminary injunction was denied.[3/] The District Court directed entry of final judgment pursuant to Rule 54(b) FR Civ. P. and an appeal was immediately taken pursuant to 28 U.S.C. § 1291.

While the appeal was pending Congress passed the

[2/] The District Court's interpretation of 16 U.S.C § 478 was not clear. On appeal, however, the defendants essentially abandoned any access based on that statute and it has accordingly not been central to the case since. The Circuit Court's decision does not address 16 U.S.C. § 478.

[3/] The Court of Appeals denied a motion for injunction pending appeal but expedited its consideration of the appeal. During the appeal, BN undertook construction of one of its roads (the Buck Creek road). Such construction has occurred in the late summer and fall months because winter weather and FS stipulations preclude construction at other times. The record is not clear as to how far construction has progressed. However, the Buck Creek area may well not be suitable for Wilderness designation. No construction has, however, been undertaken on the Yellow Mules Roads. Moreover, the record indicates that BN has other access applications pending in the Gallatin National Forest. Accordingly, the present Petition presents issues that are not moot, regardless of the status of construction of the Buck Creek road.

Alaska National Interest Lands Act (Alaska Lands Act), Pub. L. No. 96-487, 94 Stat. 2371, Nov. 12, 1980, which contained a provision, Sec. 1323, granting private access across public lands to private inholdings. Appellees interjected this issue into the appeal, asserting that the appeal should be dismissed or that Sec. 1323 served as an alternate ground for affirmation.

By its opinion of May 14, 1981, the Circuit Court reversed the District Court, finding that Sec. 1323 of the Alaska Lands Act applies only to Federal lands in Alaska, that BN has no implied easement based on Congressional intent underlying the NP land grants and that easements by necessity do not apply to these Federal lands. (See Opinion, Appendix A-1 -- A-33).

On rehearing, the Court of Appeals reversed its holding that Sec. 1323 applies only to public lands in Alaska and held that BN has a right under Sec. 1323(a) to cross FS lands in Montana to reach its inholdings. The Court of Appeals withdrew its previous opinion and did not address in its second opinion the easement by necessity or the implied easement issues.

ARGUMENT

I. THE ERRONEOUS HOLDING OF THE NINTH CIRCUIT THAT THE ACCESS PROVISION OF THE ALASKA LANDS ACT APPLIES TO FEDERAL LANDS OUTSIDE ALASKA HAS NATIONWIDE IMPLICATIONS BECAUSE IT RENDERS THE FEDERAL LAND MANAGEMENT AGENCIES THROUGHOUT THE NATION POWERLESS TO DENY PRIVATE ACCESS, EVEN WHERE SUCH ACCESS WOULD HAVE DEVASTATING CONSEQUENCES TO THE FEDERAL LANDS.

A. The Question Is An Important One

The Court of Appeals, after first finding that Sec. 1323(a) of the Alaska National Interest Lands Conservation Act (Alaska Lands Act) Pub. L. 96-487, 94 Stat. 2371 (1980) applies only to federal lands in Alaska, reversed itself and held that the provision applies nationwide. As a consequence, the United States Forest Service, and probably the other Federal Land Management agencies such as the National Park Service and the Bureau of Land Management, are powerless to deny access to the private inholder, regardless of the consequences to the public land.

There are substantial private inholdings surrounded by public lands. A Congressional study in 1964 indicated that there are approximately 38 million acres in private ownership within the 181.5 million-acre National Forest System. Senate Report No. 1174, July 8, 1964; House Report No. 1920, Sept. 30, 1964,

"National Forests--Roads and Trails" at p. 5177. The report further states:

> Within the exterior boundaries of the national forests there are some 38 million acres of land in private ownership. In many of the Western States, it is common to find square mile sections of land in alternating private and Federal ownership in a typical checkerboard pattern, a pattern resulting from the railroad land grants made in the latter part of the 19th century
>
> . . . .
>
> While the checkerboard pattern of mixed ownership is typical only of some of the Western States, private inholdings within the external boundaries of the national forests exist also in the forest lands acquired under the Weeks law. In the State of West Virginia, for example, 835,606 acres are in private ownership within the exterior boundaries of the national forests while 806,375 acres are administered by the U.S. Forest Service. In the State of North Carolina there are 1,741,679 acres of private land inside the national forest boundaries where 1,079,144 acres of public land are administered by the Forest Service. And in the State of Kentucky, 899,524 acres, of private land exist within the boundaries of the national forests which otherwise comprise only 457,561 acres of federally owned land.

There are also private inholdings within Federal lands administered by the Bureau of Land Management, National Park Service, and other Federal Land management agencies.

Thus, because there are numerous private holdings

within federal land reservations the impact of the Ninth Circuit interpretation is substantial. Across the nation, wherever private lands are surrounded by federal lands, access must be granted, even where such private lands are within Wilderness Areas or within the boundaries of National Parks.[4/]

The decision of the Ninth Circuit is also of

4/ Prior to the interpretation of the Ninth Circuit, the land management agencies had discretion to grant or deny access. Accordingly, where wilderness values were not paramount and where there were no other compelling reasons, environmental or otherwise, for the preservation of the Federal lands, access could be granted pursuant to the discretionary authority of the Agencies. The U.S. Forest Service's discretionary authority to grant or deny access is under 16 U.S.C. 532 and the Federal Land Policy & Management Act, (FLPMA) 43 U.S.C. Secs. 1761-1771. The bureaus of the Department of Interior also have such discretionary authority under FLPMA.

In addition, various exchange authorities enable Federal authorities to exchange Federal lands for private (or state) lands. This allows the government to protect and consolidate critical lands and give up lands less critical. For example, the government, through exchange can eliminate private inholdings within National Parks by exchanging Federal lands outside National Parks for the private lands within the Parks. See 16 U.S.C. § 4601-22 (Supp. V. 1970). See One Third of The Nation's Land, Report of the Public Land Law Review Commission, 1970, p. 272.

national significance because it sanctions the repeal by implication of an important section of the Wilderness Act of 1964, 16 U.S.C. 1134 et seq. Section 5(a) of the Wilderness Act requires that a private inholder within a Federal Wilderness be afforded access or be given the opportunity to exchange his inholding for Federal lands of equal value elsewhere. Attorney General Civiletti, in his Opinion of June 23, 1980, 43 Op. Att'y Gen. No. 26, held that. Sec. 5(a) of the Wilderness Act ". . . requires that the state or private inholders be given such rights as are necessary to assure adequate access or that the land be exchanged for federally owned land of approximately equal value," and that the government has the option to offer either an exchange or access. This option is very important to the government because it allows it to avoid a grant of access in critical cases by an offer of a land exchange in lieu. If, on the other hand, the government must grant access in all cases, as the Ninth Circuit has ruled, the private inholder has the right to insist on access regardless of the consequences to the public lands. This interpretation, which results in a repeal by

implication of Sec. 5(a) of the Wilderness Act, is inconsistent with the "cardinal rule . . . that repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974), quoting Posadas v. National City Bank, 296 U.S. 497, 504 (1936).5/

The alternate interpretation, and the one originally made by the Ninth Circuit, is that Sec. 1323 of the Alaska Lands Act applies only to Federal lands in Alaska. This is the sensible interpretation because the Alaska Lands Act in its entirety deals with one subject only - Federal lands in Alaska. It is also noteworthy that the problem of private inholdings in Alaska is unique because of the extensiveness of

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5 /There are other important public land access provisions that are either repealed by implication or significantly modified by implication as a result of the decision. The Federal Land Policy and Management Act, 43 U.S.C. 1701 et seq., esp. §1761-1764, applies generally to all of the lands administered by the Bureau of Land Management and the United States Forest Service. This title gives the two agencies the discretionary authority to grant rights-of-way across Federal lands. This section, as it applies to inholdings within the National forest would be significantly modified if the Appellees' interpretation were to prevail. The same is true for other important Federal land law provisions such as 16 U.S.C. §532-538, esp. §533 (Act of October 13, 1964); 16 U.S.C. §478 (Forest Service Organic Act of 1897--see interpretation of Attorney General Civiletti of June 23, 1980).

such inholdings and because of the sensitivity of Congress to the magnitude of the public lands withdrawn by the Act.[6/] The Ninth Circuit has taken this unique statutory provision, designed to address a particular local problem, and has interpreted it as applying nationwide. This unwarranted extension of the access provision has severely curtailed the ability of Federal agencies to manage the Federal lands throughout the nation.

Moreover, the holding that private inholders throughout the Nation may insist on access across Federal lands in all cases has also resulted in a loss of leverage on the part of the Federal government in negotiating access across private lands to reach Federal inholdings. Under the new ruling a private inholder has the right of access to cross Federal lands in all cases. Yet, under Leo Sheep Co. v. United States, 440 U.S. 668 (1979) the U.S. has no implied easement to cross private lands. See Coggins and Wilkinson, Federal Public Land and Resources Law, 1980;

6/ In addition, Alaska poses a different problem from that of the lower forty-eight because 95% of Alaska is in Federal ownership. One Third of The Nation's Land, Report of the Public Land Law Review Commission, 1970, p. 23.

"Consider the converse of Leo Sheep: could the BIM close its lands to plaintiffs, cutting off their access to their property? Sauce for the goose . . . ." Id. at 105.

Unfortunately, where the private party is assured access, the incentive of the private party to grant reciprocal access to the Federal government is diminished. This has resulted in the past in a lock-up by private landowners of large acreages of Federal timberlands, a situation which was remedied by Attorney General Kennedy in 1962. That opinion stated that the U.S. Forest Service could legally condition grant of access to private parties on reciprocal rights being given to the U. S. to cross private lands. See 42 Op. Att'y Gen. 127 (1962) and Senate Report No. 1174, July 8, 1964,"National Forests--Roads and Trails"; See also Cong. Rec. - Senate, March 1, 1967, p.p. 3266-3279. Now, as a result of the Ninth Circuit Opinion, the Forest Service is again severely handicapped in its ability to negotiate.

In sum, the Court of Appeals has decided an important and far-reaching question of Federal law. This question has never been decided by this Court,

but is a suitable question for review, and should now be resolved by the Court. See Rule 17(c), Rules, Supreme Court of the United States.

B. The Interpretation of the Ninth Circuit is Erroneous

Section 1323(a) of the Alaska Lands Act directs the Secretary of Agriculture to provide access to "nonfederally owned land within the National Forest System." Section 1323(b) directs the Secretary of the Interior to provide access to "nonfederally owned lands surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82). . . ." The term "National Forest System" is not defined in the Alaska Lands Act, but the term "public lands" is defined in Section 102(3):

> The term "public lands" means land situated in Alaska, which, after the date of enactment of this Act, are Federal lands, except . . . .

(Emphasis added). As the Ninth Circuit opinion notes, subsections (a) and (b) should be read in pari materia. Accordingly, the reference to"public lands" in subsection (b) applies to the reference to National Forest System in subsection (a). Since "public lands"

are defined in the Act as lands "in Alaska", it follows that the entire section applies only to lands in Alaska.

While the term "National Forest System" is not explicitly defined in the Alaska Lands Act, the Act expressly limits the use of the generic term to National Forest lands in Alaska. The preamble to the Act expresses the purpose that it is:

> An act, to provide for the designation and conservation of certain public lands in the state of Alaska, including the designation of units of the national park, national wildlife refuge, national forest, national wild and scenic rivers, and national wilderness preservation systems, and for other purposes.

Pub. L. 96-487, 96th Cong., 94 Stat. 2371 Title. (Emphasis added).

The very statement of purposes contained in Title I of the Alaska Lands Act makes clear that the Congressional intent was to preserve lands in the state of Alaska:

> In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the state of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following title are hereby established.

Section 101(a), 16 U.S.C. 3101. (Emphasis added).7/

The Ninth Circuit correctly concluded that "[it] is not unreasonable to read Section 1323(a) as referring to the National Forest System in the context in which it is used in Title V of the Act rather than to all national forests in the United States." (See Appendix p. A-10). The opinion further noted that such an interpretation is supported by a review of the entire Act, which discloses no other provision having nationwide application. Id. at A-11. Paradoxically, then, and despite this finding, the Ninth Circuit, on rehearing, reversed its first opinion.

In reversing, the Court relied upon the weakest of statutory interpretive criteria, namely, legislative history of a subsequent piece of unrelated legislation. The Court based its conclusion in its second opinion upon insights supposedly gleaned from an examination of the Colorado Wilderness bill's legislative history. Debates on the Colorado Wilderness bill, passed subsequent to the Alaska Lands Act, obviously should have

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7/See also sec. 101(d), which speaks to the need to protect lands of "national interest". . . "in Alaska" and at the same time provide for satisfaction of "the economic and social needs of the State of Alaska and its people."

had no bearing upon the Court's interpretation of Congressional intent regarding the access provision of the earlier enactment. Nevertheless, the Ninth Circuit relied upon this data in forming its conclusion that Sec. 1323 of the Alaska Lands Act was intended to apply nationwide.

The Ninth Circuit's unwarranted conclusion disregards one of the strongest indicia of statutory construction, the overall context of the Act. As noted above, the entire Alaska Lands Act deals with lands in Alaska, and the title of the Act, the statement of purpose, and the numerous sections of the Act, deal only with Federal lands in Alaska. The context of that massive and complicated Act overwhelmingly points to a construction of Section 1323 which indicates that it is limited in its scope to lands in Alaska.

Comments made on a subsequent piece of legislation, such as those relied on by the Ninth Circuit, are entitled to little weight in construing an earlier enactment. In Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980), this Court stated:

> . . .we begin with the oft-repeated warning that "the views of the subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v.

> Price, 361 U.S. 304,313 (1960), quoted in United States v. Philadelphia National Bank, 374 U.S. 321, 348-349 (1963).

447 U.S. 102, 118. In a comment of even more significance, the Court continued:

> And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history. Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979). We do not think that either Representative Moss' isolated remark or the post hoc statement of the Conference Committee with respect to §6(b) is entitled to much weight here.

446 U.S. 102, 118.

The Ninth Circuit panel found, however, that it was significant that confrees on the subsequent legislation, ". . . including Representatives Udall and Sieberling and Senator Melcher, had an intimate knowledge of the Alaska Lands Act." (Appendix p. B-12). Undoubtedly they did. The panel, however, was in no way justified in relying on the subsequently expressed opinions of the conferees. Nor does the panel reconcile its position with the fact that Congressman Udall, in congressional debate on the bill in question, the Alaska Lands Act, stated:

> . . . the House believes that, as with all other provisions of the bill, the language

> of the section (1323) applied only to lands within the state of Alaska.

126 Cong. Rec. H10549, 10550 (daily ed. Nov. 12, 1980). (Emphasis added).[8] Thus the panel, while finding that Congressman Udall had an "intimate knowledge of the Alaska Lands Act", has ignored his unequivocal interpretation of the meaning of Section 1323 and of the Act as a whole.

The Ninth Circuit's interpretation, founded on subsequent legislative debate on the Colorado Wilderness bill, is erroneous. Review by this Court is warranted because of the nationally significant problems which can and will flow from that mistake.

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[8] Senator Melcher made a statement to the contrary. However, his statement was made post hoc, eight days after passage of the Act. 126 Cong. Rec. S1477 (daily ed. Nov. 20, 1980). As such, Senator Melcher's statement is no weightier than that rejected by this Court in Consumer Products Safety Commission v. GTE Sylvania, supra. There is also contrary legislative history, but it is, as the Ninth Circuit Court found, wholly inconclusive. Opinion, May 14, 1981, (A-16-18).

II. THIS CASE PRESENTS THE CONVERSE OF THE ISSUE DECIDED IN LEO SHEEP CO. v. UNITED STATES, 440 U.S. 668 (1979), NAMELY, WHETHER A PRIVATE INHOLDER HAS AN ENTITLEMENT TO CROSS FEDERAL LANDS TO REACH PRIVATE INHOLDINGS. THE ISSUE PRESENTED HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Leo Sheep Co. v. United States, 440 U.S. 668 (1979) this court interpreted the Union Pacific land grant of 1862 and held that the government did not retain an implied easement to build roads across the odd-numbered sections granted to Union Pacific. As the Ninth Circuit observed, the present case, ". . . is the flip side of Leo Sheep; it involves not the implied reservation of an easement by the government over the lands given to the railroad, but the implied granting of an easement to the railroad over the lands retained by the government." See Appendix A-20.

The Ninth Circuit panel, in its opinion of May 14, 1981, reversed the District Court's holding that Burlington Northern had an implied easement based on Congressional intent underlying the Northern Pacific land grants. The Ninth Circuit held that Leo Sheep controls the present case, following the reasoning of this Court in Leo Sheep that "the problems of landlocking the inherent in the checkerboard configuration

could be resolved not only by eminent domain, but through the customary process of negotiation." Appendix p. A-21. The Ninth Circuit relied on the following finding of this Court in Leo Sheep:

> Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.

Leo Sheep, 440 U.S. at 686.

As the Ninth Circuit observed: "The interpretation is particularly apt, given the expectation of Congress that both the government and the railroad would soon transfer their interests in much of the checkerboard land to other parties. Leo Sheep, 440 U.S. at 686, n. 23." Appendix p. A-21.

The Ninth Circuit panel further found:

> Under Leo Sheep, neither the government nor successor owners of even-numbered sections have the easement rights that Burlington Northern claims as an owner of odd-numbered sections. Should Burlington Northern prevail in this case, the result would indeed be strange: private owners of land in odd-numbered sections would have rights to build roads across even-numbered sections owned by the government or private parties without being required to pay for the easement; the government

> and private owners of land in contiguous odd-numbered sections would have no reciprocal rights. As the Court said in Leo Sheep, "[i]t is possible that Congress gave the problem of access little thought . . .", but it seems highly improbable that if Congress had given the problem of access much thought it would have intended such a result. If the congressional purpose of settlement and development may be served without implied easements for the owners of the even-numbered sections, as Leo Sheep holds, it may also be served without implied easements for the railroads and their successor owners of odd-numbered sections.

Appendix, pgs. A-23-24.

This holding of the Ninth Circuit reasonably follows from the Court's holding in Leo Sheep. However, because of the Ninth Circuit's erroneous interpretation of Sec. 1323(a) of the Alaska Lands Act in its second opinion, its first opinion has been withdrawn. This withdrawal has reinstated the District Court opinion, which held Leo Sheep inapplicable.

The question whether private parties have an implied easement to cross Federal lands is a question which has not been, but should be settled by this Court.

Huge amounts of land are held by private

railroads, interlocked in a "checkerboard" pattern with Federal lands. Over 100 million acres in alternate odd-numbered sections were granted to the railroads, directly or indirectly between 1850 and 1871, resulting in a ". . . strange pattern of ownership . . . whereby neither private nor public owner could gain access to its property without at least nominal trespass upon the property of the other." Coggins & Wilkinson, Federal Public Land and Resources Law, 1980, p. 90. One authority estimates that as much as 15 percent of what is now the State of Montana was granted to Northern Pacific Railway.[9/] See also, United States v. Northern Pacific R. Co., 311 U.S. 317 (1940) for a discussion of the magnitude of the Northern Pacific grants. As the record in this case indicates, a large amount of the acreage granted is still retained by Burlington Northern. Moreover, even where such lands have been transferred to other private owners a significant question remains - whether the new private owner has

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9/ Gates, P., History of Public Land Law Development, Washington, D.C., 1968, p. 477.

an implied easement as successor to Northern Pacific Railroad.

Thus, the repercussions of the determination by the Ninth Circuit Panel that Burlington Northern has an implied easement to cross Federal lands can and will be enormous. The issue herein presented is an important issue with significant and far-reaching consequences. As much, it merits review and ultimate disposition by this Court.

III. THE ISSUE OF WHETHER AN EASEMENT BY NECESSITY MAY BE APPLIED TO FEDERAL LANDS IS AN IMPORTANT ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The District Court held that, in addition to the implied easement, BN has an easement by necessity to cross the Federal lands. This holding initially was reversed by the Ninth Circuit in its opinion of May 14, 1981. See Appendix, A-26. Petitioners contend, as they did below, that the doctrine of easement by necessity does not apply to the Federal government. The government agrees. Attorney General Civiletti held in his 1980 Opinion:

> The doctrine of easement by necessity was developed to settle disputes between private parties, not disputes involving the Federal government.

42 Op. Att'y Gen. No. 26 (1980), p. 2.[10] See also Thompson, Real Property, §362, p. 411 (1961):

> Ways of necessity do not arise against

10/ Attorney General Kennedy, in a 1962 opinion, determined that it was unnecessary to decide whether inholders had an easement by necessity to cross Federal lands. However, Kennedy did add, "It is my view that these easements do not exist over public lands". 42 Op. Att'y Gen. No. 7, p. 22, (1962).

> the state. And the right does not exist in any case in favor of the grantee of the state over other lands belonging to the state.

But see contra authority, 3 R. Powell, Real Property ¶410 at 34-72, 34-73 (1979).

The Ninth Circuit panel found that, "[a]s we read the law of this circuit, it has been assumed that the doctrine of easement by necessity can apply against the sovereign. See Superior Oil Co. v. United States, 353 F.2d 34, 36-38 (9th Cir., 1965); Cf. United States v. Dunn, 478 F.2d 443, 444, n.2, 446 (9th Cir. 1973)." Id. at A-25. The panel nevertheless found that "[i]n the present case, . . . the intent of Congress precludes the finding of an easement by necessity." Id. at A-25.

This opinion was withdrawn by the opinion on rehearing resulting in a reinstatement of the District Court's holding that BN has a way of necessity across the Federal lands. This is a question of great importance to the Federal Government which

has never been settled by this Court.[11] In light of Attorney General Civiletti's Opinion, Petitioners suggest that the Soliciter General may wish to join in the Petition for Certiorari on this issue. In any event, because the question is unsettled and because of its importance, review is warranted by this Court.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted as to all questions presented.

GOETZ, MADDEN & DUNN, P.C.

By _____
JAMES H. GOETZ
P. O. Box 1322
Bozeman, Montana 59715
Attorney for Petitioner

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[11] This Court dealt tangentially with the easement by necessity issue in the Leo Sheep case, finding in the context of that case that the application of the doctrine to the statutory land grant was "somewhat strained, and ultimately of little significance". 440 U.S. 680, 681.

Certificate of Service

I hereby certify that I have this _____ day of November, 1981, served the foregoing "Petition fo Certiorari" upon all parties by causing copies therof to be sent by first class U.S. mail, postage prepaid, to the offices of their attorneys, as listed below:

Wade H. McCree, Jr.
Solicitor General
United States Department of Justice
Ben Franklin Station
Room 5143
Main Justice Building
Washington, D.C. 20044

Dirk D. Snel, Esquire
Land & Natural Resources Division
Department of Justice
Ben Franklin Station
P. O. Box 7415
Washington, D.C. 20044

Attorneys for Federal Defendants-
Appellees

Kurt W. Kroschel, Esquire
Regional Counsel
Law Department
Burlington Northern, Inc.
First Northwestern Bank Center
175 North 27th Street, Suite 1003
Billings, Montana 59101
(406) 657-8387

Attorney for Defendant-
Appellee Burlington Northern

David Booth Beers
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for National
Forest Products Association

Rich Anderson, Esquire
Assistant U.S. Attorney
United States Attorney's Office
167 Federal Building
Butte, Montana 59701
(406) 723-6561

Michael H. Hyer, Esquire
Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

Attorneys for Amicus Curiae
Mountain States Legal Foundation

James M. Goetz
GOETZ, MADDEN & DUNN, P.C.
P. O. Box 1322
Bozeman, Montana 59715
(406) 587-0618

Attorneys for Petitioner

Subscribed and sworn to before me, a Notary Public for the State of Montana, this _____ day of November, 1981.

_____
Notary Public
Residing at Bozeman, Montana
My commission expires

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* *

MONTANA WILDERNESS ASSOCIATION, NINE QUARTER CIRCLE RANCH, and THE WILDERNESS SOCIETY, Plaintiffs/Appellants, -vs- UNITED STATES FOREST SERVICE, JOHN McGUIRE, its CHIEF; LEWIS HAWKES, Gallatin National Forest Supervisor; UNITED STATES FISH AND WILDLIFE SERVICE, HARRY WILLOUGHBY, its regional director; BURLINGTON NORTHERN, INC., a Delaware corporation; BOB BERGLAND, Secretary of Agriculture, Defendants/Appellees, and THE NATIONAL FOREST PRODUCTS ASSOCIATION, Intervening Defendant/Appellee.	No. 80-3374 D.C. No. 79-29-Bu OPINION

Appeal from the United States District Court
for the District of Montana
W. D. Murray, District Judge, Presiding
Argued and Submitted February 9, 1981

Before: ANDERSON and NORRIS, Circuit Judges, and SCHWARZER*, District Judge.

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

NORRIS, Circuit Judge:

This appeal raises fundamental questions concerning the conflict between the ability of the executive branch of the federal government to manage public lands and the access rights of persons whose property is surrounded by those lands. Environmentalists and a neighboring property owner seek to block construction by Burlington Northern of roads over parts of the Gallatin National Forest. They appeal from a partial summary judgment in the district court granting Burlington Northern a right of access to its totally enclosed timber lands. Montana Wilderness Association v. United States Forest Service, 496 F. Supp. 880 (D. Mont. 1980). The district court held that Burlington Northern has an easement by necessity or, alternatively, an implied easement under the Northern Pacific Land Grant of 1864. Id. at 883-88. The defendants argue that the Alaska National Interest Lands Act of 1980, passed subsequent to the district court's decision, also grants Burlington Northern assured access to its land.

The appellants contend that the doctrine of easement by necessity does not apply to the sovereign, that there was no implied easement conveyed by the 1864 land grant, and that the access provisions of the Alaska Lands Act do not apply to land outside the state of Alaska. We conclude that the appellants are correct on all three issues. We therefore reverse the partial summary judgment and remand the case for further proceedings.

I. FACTS.

Defendant-appellee Burlington Northern, Inc. owns timber land located within the Gallatin National Forest southwest of Bozeman, Montana. This land was originally acquired by its predecessor, the Northern Pacific Railroad, under the Northern Pacific Land Grant Act of 1864, 13 Stat. 365. The Act granted odd-numbered square sections of land to the railroad, which, with the even-numbered sections retained by the United States, formed a checkerboard pattern.[1]

To harvest its timber, Burlington Northern

in 1979 acquired a permit from defendant-appellee United States Forest Service, allowing it to construct an access road across national forest land. The proposed roads would cross the Buck Creek and Yellow Mules drainages, which are protected by the Montana Wilderness Study Act of 1977, Pub. L. 95-150, 91 Stat. 1243, as potential wilderness areas. The proposed logging and road-building will arguably disqualify the areas as wilderness under the Act.

The plaintiffs, Montana Wilderness Association, The Wilderness Society, and Nine Quarter Circle Ranch, having contested the granting of the permit, filed suit after it was granted, seeking declaratory and injunctive relief. A temporary restraining order was granted. Before the scheduled preliminary injunction hearing, the Forest Service suspended the permit and submitted the legal question of Burlington Northern's right of access to the Attorney General. The case lay dormant until Attorney General Civiletti issued his opinion.

Op. Att'y Gen., slip at 1 (June 23, 1980). Of the three theories given in support of Burlington Northern's right of access, the Attorney General rejected two--that there is a right of access under the Forest Service Organic Administrative Act of 1897, 16 U.S.C. §478, and that Burlington Northern has an easement by necessity--but left open the issue whether Burlington Northern has an implied easement under the Northern Pacific Land Grant of 1864.

After the Attorney General's opinion was issued, the Forest Service reconsidered the case, and reinstated the permit on the grounds that Burlington Northern had an assured right of access under the 1864 land grant.[2] The parties immediately filed cross motions for summary judgment on the assured access issue. The district court denied the plaintiff's motion, and granted the defendants' partial summary judgment motion. The order for partial summary judgment was designated as final for purposes of appeal pursuant to Fed. R. Civ. P. 54(b).

During the pendency of this appeal, construction of an access road through the Buck Creek drainage has proceeded to such an extent that it is unclear whether completion of the road will cause any more environmental damage than has occurred already.[3] In any case, the appeal is not moot because the construction of access roads through the Yellow Mules drainage has not yet begun.

II. ANALYSIS.

The sole issue on appeal is whether Burlington Northern has a right of access across federal land to its inholdings of timber land. The federal appellees urge that the passage of the Alaska Lands Act after the district court's decision renders this appeal moot. The private appellees deny that the Act moots the case, contending that it is merely an alternate ground for upholding the district court. Since we conclude that the Alaska Lands Act does not apply to non-Alaskan land, we need not face the mootness issue.

A. The Interpretation of the Alaska Lands Act

Appellees contend that the recently

enacted Alaska National Interest Lands Conservation Act (Alaska Lands Act), Pub. L. No. 96-487, 94 Stat. 2371 (1980), establishes an independent basis for affirming the judgment of the district court. They argue that § 1323(a) of the Act requires that the Secretary of Agriculture provide access to Burlington Northern for its enclosed land. Upon examination of the statute and the legislative history, we do not find this interpretation of the Alaska Lands Act convincing.

Section 1323 is a part of the administrative provisions, Title XIII, of the Alaska Lands Act. Appellees argue that it is the only section of the Act which applies to the entire country; appellants argue that, like the rest of the Act, it applies only to Alaska. Section 1323 reads as follows:

> Sec. 1323. (a) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the

> Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.
>
> (b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the responsible use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.

This section provides for access to nonfederally-owned lands surrounded by certain kinds of federal lands. Subsection (b) deals with access to nonfederal lands "surrounded by public lands managed by the Secretary [of the Interior]." Section 102(3) of the Act defines "public lands" as certain lands "situated in Alaska." Subsection (b) is therefore limited by its terms to Alaska.

Subsection (a) deals with access to non-federally-owned lands "within the boundaries of the National Forest System." The term "National Forest System" as used in § 1323(a) is to be interpreted as being limited to national forests in Alaska or as including the entire United States.

The parties have not directed us to, nor has our research disclosed, as established or generally accepted meaning for the term "National Forest System." The United States Code contains no statutory definitions for it. We find no record of Congressional use of the term prior to the enactment of the Federal Land Policy and Management Act of 1976. The term "National Forest System" appears in that Act but is nowhere defined; from the context, however, it is apparent that it is used there to refer to national forests anywhere in the United States. See 43 U.S.C. §§ 1701, et seq. The same Act also uses the term "public lands" and defines it as meaning lands "owned by the United States within the several States,"

clearly a definition different from that given the same term in the Alaska Lands Act.

We therefore perceive no basis for assuming that Congress necessarily used the term "National Forest System" in the Alaska Lands Act to refer to national forests in the United States generally. We think that in this context the meaning of the term is ambiguous and therefore look to other indicia.

The Act itself provides some help. Title V of the Act is entitled "National Forest System." Section 501(a) states: "The following units of the National Forest System are hereby expanded . . . ." This language shows that Congress used the term "National Forest System" in this Act in a context which refers to and deals with national forests in Alaska. It is not unreasonable to read Section 1323(a) as referring to the "National Forest System" in the context in which it is used in Title V of the Act, rather than to all national forests in the United States.

As the parties agreed at oral argument, moreover, § 1323(b) is in pari materia with § 1323(a). The two subsections are placed together in the same section, and use not only a parallel structure but many of the

same words and phrases. The natural interpretation is that they were meant to have the same effect, one on lands controlled by the Secretary of Agriculture, the other on lands controlled by the Secretary of the Interior. Since § 1323(b), by the definition of public lands in § 102(3), applies only to Alaskan land, a strong presumption arises that § 1323(a) was meant to apply only to Alaska as well.

That interpretation is confirmed by a review of the entire Act which discloses no other provision having nation-wide application.[4] To attach such a sweeping effect to this obscure and seemingly minor provision of the Act would seem incongruous under the circumstances. We therefore conclude that the language of the Act supports the interpretation that § 1323(a) applies only to national forests in Alaska. Bearing in mind that "[a]bsent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive," Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980), we turn to the legislative history.

Section 1323 was added to the Alaska Lands Bill by the Senate Committee on Energy and Natural Resources

in its amendment to H.R. 39, originally passed by the House. S. Rep. No. 96-413, 96th Cong. 1st Sess. (1979), reprinted in [Feb. 1981] U.S. Code Cong. & Ad. News 9130. It was incorporated in the Tsongas substitute bill which replaced by amendment the Energy Committee's proposed bill, 126 Cong. Rec. S11099, S11140 (daily ed. Aug. 18, 1980). The Tsongas substitute bill was passed by the Senate, 126 Cong. Rec. S11193 (daily ed. Aug. 19, 1980), and House, 126 Cong. Rec. H10552 (daily ed. Nov. 12, 1980), and became law on December 1, 1980, 94 Stat. 2371.

Section 1323 is mentioned only twice in the Senate materials. The Energy Committee report discussed it in its section-by-section analysis,[5] S. Rep. No. 96-413 at 310, [Feb. 1981] U.S. Code Cong. & Ad. News at 9314, and Senator Melcher, the author of the section, discussed it on the floor of the Senate, 126 Cong. Rec. S14770-71 (daily ed. Nov. 20, 1980). The remarks of Senator Melcher, however, were made on November 20th, eight days after Congress passed H.R. 39. His remarks clearly demonstrate that his personal understanding of the section is that it applies nationwide, but because they are the remarks of but one

senator made subsequent to the passage of the bill they do not provide a reliable indication of the understanding of the Senate as a whole.

Although the appellees contend that the language of the Energy Committee report makes perfectly clear the Committee's intent that § 1323 apply nationwide, we do not find their interpretation of the report's language persuasive:

> This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands. It has been the Committee's understanding that such owners had the right of access to their lands subject to reasonable regulation by either, the Secretary of Agriculture in the case of national forests, or by the Secretary of the Interior in the case of public lands managed by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976. However, a recent District Court decision in Utah (Utah v. Andrus et al., C79-0037, October 1, 1979, D.C. Utah) has cast some doubt over the status of these rights. Furthermore, the Attorney General is currently reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and the Interior.
>
> * * * * *
>
> The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access [across] National Forests and public land, subject,

> of course, to reasonable rules and regulations.

S. Rep. No. 96-413 at 310, [Feb. 1981] U.S. Code Cong. & Ad. News at 9314.

While the Committee's intent to guarantee access is clear, it is less than clear whether this provision was meant to guarantee access outside of Alaska. The problem raised in the first paragraph--the differing interpretations of the law of access--is not confined to Alaska, but the scope of the remedy as set forth in the last paragraph could be so confined. As with § 1323 itself, the report uses indiscriminately terms defined in the Act as applying only to Alaskan land ("public land") and terms not so defined ("National Forests").

The absence of any reference to Alaska is not of much import. The report's discussion of other access provisions such as § 1110 and § 1111, which all parties agree apply only to Alaska, fails to mention Alaska and is as ambiguous about whether § 1110 and § 1111 apply nationwide as is the discussion of § 1323. S. Rep. No. 96-413 at 299-300, [Feb. 1981] U.S. Code Cong. & Ad. News at 9303-04.

What we find most significant in the legislative

history in the Senate is the same thing that Sherlock Holmes found to be crucial in solving the case of the Hound of the Baskervilles--the failure of the dog to bark. The Alaska Lands bill was discussed endlessly on the Senate floor. There are numerous occasions when one would expect a change in current laws of access of the magnitude of the appellees' proposed interpretation of § 1323 to be discussed, mentioned or at least alluded to. Yet we have not found in the Senate debates, and appellees have not called to our attention, one single suggestion that anything in the Alaska Land Bill would affect access rights in the rest of the country. In Senator Tsongas' long, detailed comparison of his substitute bill with the Energy Committee bill, § 1323 is not mentioned. 126 Cong. Rec. S11193 (daily ed. Aug. 19, 1980).[6] In discussion about the adequacy of the substitute bill's access provisions (which include § 1323) no mention is made of a change in the law of access for the rest of the country. 126 Cong. Rec. S11061-62 (daily ed. Aug. 18, 1980). We find it difficult to believe that the Senate would have contemplated and effected a profound change in the law of access across government land for the entire country

without ever mentioning it.

The legislative history in the House, which considered and passed the Tsongas substitute bill after it was passed by the Senate, also presents an ambiguous picture of § 1323. On October 2, 1980, Representative Udall, chairman of the Committee on Interior and Insular Affairs which had joint responsibility for the bill, introduced an amendment one section of which was to "make clear that [the bill] applies only to Alaska." 127 Cong. Rec. 10376 (daily ed. October 2, 1980). This amendment was never adopted. Representative Udall subsequently declared in prepared remarks inserted into the Congressional Record that although the final version of the bill was "ambiguously drafted and not expressly limited to Alaskan lands, the House believes that, as with all the other provisions of the bill, the language of the section applies only to lands within the State of Alaska." 126 Cong. Rec. H10549 (daily ed. Nov. 12, 1980). Representative Weaver stated that the section granting access rights to inholders on national forest and BLM lands "apparently applies not only to Alaska but also to the entire United States." 126 Cong. Rec. H8638 (daily ed. September 9, 1980). Representative Sieberling

inserted into the record a summary of proposed amendments, which refers to Section 1323 as the "nationwide access amendment." 126 Cong. Rec. H10350 (daily ed. October 2, 1980). Representative AuCoin stated that one of the flaws of the final bill is that it "grants private inholders carte blanche access across national forest and public lands nationwide." 126 Cong. Rec. H10529-30 (daily ed. Nov. 12, 1980).

Appellees rely heavily upon an exchange of letters between Representatives Sieberling and Weaver, chairmen of the subcommittees responsible for the bill (Public Lands of the Committee on Interior and Insular Affairs and Forest of the Committee on Agriculture), and the Attorney General's office. In their letter, the representatives express concern over § 1323, which they state applies nationwide, and ask for a clarification of how different the § 1323 access language is from existing access provisions. It is indeed clear from their letter that they believed that § 1323 applies nationwide.

Appellees argue, on the basis of the September 5, 1980 return letter from Assistant Attorney General Alan Parker, that the Department of Justice confirmed this interpretation of § 1323. We interpret the letter

differently. As we read the letter, the Assistant Attorney General assumed without analysis that the representatives' interpretation of § 1323 was correct, and proceeded to discuss in detail the effect of such a change in the law.

The exchanged letters are entitled to little weight. In general, off-the-record views of congressmen are not attributed to Congress as a whole. See T.V.A. v. Hill, 437 U.S. 153, 190-91 (1978). This is particularly true where, as here, there is no indication that the House as a whole was aware of the correspondence. Id. at 191-92.

In summary, the legislative history concerning § 1323 is surprisingly sparse. The report of the Senate committee which drafted the section is ambiguous. At times when the Senate could have been expected to comment on its intention to make a major change in current law, it did not. The only expression of intent that § 1323 apply nationwide came from a single senator eight days after the Alaska Lands Act was passed by Congress. In the House debates, three representatives suggested that § 1323 did apply nationwide, but the chairman of one of the responsible com-

mittees said it did not. Two chairmen of House subcommittees responsible for the bill did state in a letter to the Attorney General that they believed that § 1323 applied nationwide, but there is no indication that the contents of this letter were generally known by members of the House, and so the letter carries little weight in our analysis. We conclude that the ambiguous legislative history gives only slight support at best to the appellees' interpretation that § 1323 applies nationwide. It is not nearly sufficient to overcome the actual language of the statute, which we believe is more naturally read as applying only to Alaska.

Moreover, § 1323 as interpreted by the appellees would repeal by implication a portion of § 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a).[7] "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored," Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976), and that "the intention of the legislature to repeal must be clear and manifest." Posadas v. National City Bank, 296 U.S. 497, 503 (1936). See also United States v. Continental Tuna Corp., 425 U.S. 164, 168 (1976); Gordon v. New York Stock

Exchange, 422 U.S. 659, 682 (1975); Regional Rail Reorganization Act Cases, 419 U.S. 102, 133 (1974); Morton v. Mancari, 417 U.S. 535, 549 (1974). Here it is far from clear that the legislature intended that § 1323 apply nationwide. We hold that § 1323 of the Alaska National Interest Lands Conservation Act is limited in its application to the state of Alaska, and so has no relevance to this case.

B. The Implied Right of Access

The district court held that Burlington Northern has a right of access implied in the 1864 Northern Pacific Railroad land grant. Montana Wilderness Association, 496 F. Supp. at 886-88. We believe that Leo Sheep Co. v. United States, 440 U.S. 668 (1979), compels us to disapprove the district court's holding on this issue.

As the district court correctly states, neither the language of the land grant nor the lengthy Congressional debates mention the issue of access to the granted lands. Montana Wilderness Association, 496 F. Supp. at 886. It is thus necessary to construe the land grant in light of its purpose and the "condition of the country when the grant was made."

Leo Sheep, 440 U.S. at 692, quoting Winona & St. Peter R. Co. v. Barney, 113 U.S. 618, 625 (1885).[8]

The crucial factor in Leo Sheep, for the purposes of this case, is the Court's interpretation of the Union Pacific land grant of 1862. In Leo Sheep, the Court held that the government did not retain an implied easement to build roads across the odd-numbered sections granted to Union Pacific in 1862. Our case is the flip side of Leo Sheep; it involves not the implied reservation of an easement by the government over the lands given to the railroad, but the implied granting of an easement to the railroad over the lands retained by the government.

As we read Leo Sheep, the Court stressed that it was Congress' purpose in making the "checkerboard" grants to aid in the construction of the railroads and to stimulate settlement and development of the West. The Court held that the Congress did not reserve to the government implied easements over the odd-numbered railroad sections, leaving the government or successor private owners of even-numbered sections in the same position that Burlington Northern would be if it had no right to build the logging road at issue here.

The Supreme Court reasoned that problems of "land-locking" inherent in the checkerboard configuration could be resolved not only by the power of eminent domain, but through the customary process of negotiation. The Court stated:

> Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.

Leo Sheep, 440 U.S. at 686.

This interpretation is particularly apt, given the expectation of Congress that both the government and the railroad would soon transfer their interests in much of the checkerboard land to other parties. Leo Sheep, 440 U.S. at 686 n. 23. Under the land grant at issue in the present case, checkerboard land retained by the government was open to homesteading, § 6, Northern Pacific Land Grant Act of 1864, 13 Stat. 365, 369, and Congress expected that the railroad would use the grant of lands to finance the construction. As the Union Pacific land grant was explained: "the lands will be settled as they are sold, and the proceeds faithfully applied to this great work." Cong. Globe, 37th Cong.,

2d Sess. 1708 (1862) (remarks of Rep. Fesierden). See also Cong. Globe, 38th Cong., 1st Sess. 2296 (1864) (remarks of Rep. Stevens); Platt v. Union Pac. R.R., 99 U.S. 48, 61 (1878).

Because of this expectation of Congress, we cannot credit the appellees' two main arguments that Leo Sheep does not bar the finding of an implied easement. They first argue that the situation in this case is different from that in Leo Sheep because the government, which was seeking an easement in Leo Sheep, has the power of eminent domain, while the railroad does not. Thus, they argue, Congress would not have found it necessary to reserve access for the government even if it granted access to the railroad. The problem with this argument, as mentioned above, is that Congress expected that the government land would be acquired in due course by homesteaders, who have no rights of eminent domain.[9]

The second argument is that the purpose of the land grant was to induce the private construction of the railroads, and that without guaranteed access to checkerboard holdings the land grants would not have been accepted. This argument overlooks the historical conditions under which the land grant was devised. As

stated in Leo Sheep, the expectation of all the parties was that the land would be settled, and the checkerboard squares broken up, by homesteading of the government lands and sale of the railroad lands. Access to property would be worked out by negotiation. Furthermore, western land at the time of the land grant was open land. The United States Government allowed not only passage but grazing of livestock on the western plains and forests in "a sort of implied license." Light v. United States, 220 U.S. 523, 535 (1911). See also Buford v. Houtz, 133 U.S. 320, 326-28 (1890). Thus, there was no need to provide for legally assured access to the checkerboard lands for the period of the building of the railroad. The United States already allowed such access, though without relinquishing its long-term rights. Since the expectation in the long run was that settlement would solve the access problems, it was not necessary for Congress to give the railroad any guarantee of permanent access.

Under Leo Sheep, neither the government nor successor owners of even-numbered sections have the easement rights that Burlington Northern claims as an owner of odd-numbered sections. Should Burlington Northern prevail in this case, the result would indeed be strange:

private owners of land in odd-numbered sections would have rights to build roads across even-numbered sections owned by the government or private parties without being required to pay for the easement; the government and private owners of land in contiguous odd-numbered sections would have no reciprocal rights. As the Court said in Leo Sheep, "[i]t is possible that Congress gave the problem of access little thought . . . ", but it seems highly improbable that if Congress had given the problem of access much thought it would have intended such a result. If the congressional purpose of settlement and development may be served without implied easements for the owners of the even-numbered sections, as Leo Sheep holds, it may also be served without implied easements for the railroads and their successor owners of odd-numbered sections.

C. The Easement by Necessity

The district court held that Burlington Northern has an easement by necessity across the federal lands to its inholding. Montana Wilderness Association, 496 F. Supp. at 883-86. The appellants and federal

appellees contend that this holding is in error and that the doctrine of easement by necessity does not apply against the sovereign. Compare 3 R. Powell, Real Property ¶ 410 at 34-72, 34-73 (1979) with 2 G. Thompson, Real Property § 362 at 389 (1980).

As we read the law of this circuit, it has been assumed that the doctrine of easement by necessity can apply against the sovereign. See Superior Oil Co. v. United States, 353 F.2d 34, 36-38 (9th Cir. 1965). Cf. United States v. Dunn, 478 F.2d 443, 444 n.2, 446 (9th Cir. 1973) (issue not raised by the parties, but commented upon by the majority in a footnote, and by the dissent). However, this court will carefully scrutinize the circumstances of the conveyance to ensure that the implication of an easement by necessity is consistent with the intent of the sovereign. See Superior Oil, 353 F.2d at 37-38.[10] See also 3 R. Powell, supra ¶ 410 at 34-71 (where there is evidence of the parties' contrary intent, an easement by necessity will not be implied.)

In the present case, we find that the intent of Congress precludes the finding of an easement by necessity. We have discussed Congress's intent in enacting the 1864 Northern Pacific land grant in the

previous section. In light of that discussion, and following Leo Sheep, we find that Congress did not intend to grant access by means of a permanent easement. We therefore hold that Burlington Northern does not have an easement by necessity across federal land to its inholding.

For the above reasons, the partial summary judgment granted by the district court is REVERSED, and this case REMANDED for further proceedings consistent with this opinion. The mandate shall issue forthwith.

FOOTNOTES

1. For a more complete discussion of the history of the railroad land grants, see Leo Sheep Co. v. United States, 440 U.S. 668 (1979); Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942); United States v. Northern Pacific Ry. Co., 311 U.S. 317 (1940); and Platt v. Union Pacific Ry., 99 U.S. 48 (1878).

2. If Burlington Northern does not have an enforceable right of access, the protected status of the federal land may remove the Secretary of Agri-

culture's usual discretion to grant access over Forest Service land. Section 3(a), Montana Wilderness Study Act, Pub. L. 95-150, 91 Stat. 1243 (1977). Burlington Northern's remedy would be the eventual exchange of its inholdings for other federal land of comparable value. 16 U.S.C. § 1134(a); H.R. Rep. No. 95-620, 95th Cong., 1st Sess. 6 (1977).

3. A preliminary injunction to halt the construction was denied by the district court, and by this court on appeal.

4. The appellees concede that no other section of the Act applies nationwide. They argue, however, that because another provision of the Act, § 1110(b), gives access rights to all Alaskan inholders, § 1323(a) is superfluous unless it is interpreted to apply to the entire country. Section 1110(b), they argue, like § 1323(b), applies only to Alaska because it uses terms, "public lands" and "conservation system unit," which are defined to include only Alaskan land.

The flaw in appellees' argument is that

however § 1323(a) is interpreted, § 1110(b) essentially duplicates the protection given Alaskan lands by § 1323 as a whole. Section 1110(b) overlaps § 1323(b) just as much as it overlaps § 1323(a). If, as appellees claim, § 1110(b) gives access to all Alaskan inholders and § 1323(a) gives access to holders of land surrounded by land administered by the Secretary of Agriculture, the inclusion of § 1323(b) in the Act makes no sense at all. Section 1323(b), after all, gives access to holders of Alaskan land surrounded by land administered by the Secretary of the Interior. Under this view, not only is § 1323(b) superfluous in light of § 1110(b), it is paired with a provision, § 1323(a), of parallel structure but widely different scope. We do not see how the existence of § 1110(b) gives much support to the appellees' position.

5. The Committee analysis mixes up §§ 1323 and 1324. Thus, the analysis entitled § 1324 is really concerned with § 1323 and vice versa.

6. Neither did Senator Tsongas remark on § 1323 when it was first proposed in the Energy Committee bill, even though in his statement in the Committee report he spends several pages criticizing the bill's overbroad provisions on access. S. Rep. No. 96-413 at 422-24, [Feb. 1981] U.S. Code Cong. & Ad. NEws at 9422-23 (additional views of Senators Metzenbaum and Tsongas). Yet the extension of § 1323(a) to the entire country would certainly have a greater impact than the other measures he discusses.

7. 16 U.S.C. § 1134(a) gives the Secretary of Agriculture the choice between granting access to state or privately-owned land surrounded by wilderness land and permitting the exchange of the in-held land for federally-owned land of equal value. Section 1323(a), by making access mandatory, renders nugatory the land exchange provision. See generally Op. Att'y Gen. slip at 1, 23-30 (June 23, 1980).

8. The district court, in construing the land grant, mentions Leo Sheep only to extract a "rule of

liberal construction in interpreting railroad land grants." Montana Wilderness Association, 496 F. Supp. at 886, 888. We interpret the rule of construction of railroad land grants followed by the Court in Leo Sheep differently than does the district court.

The district court, in interpreting Leo Sheep to hold that railroad land grants are to be liberally interpreted, quotes language that "a railroad land grant 'should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.' Leo Sheep Co. v. United States, 440 U.S. 668, 683, quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)." Montana Wilderness Association, 496 F. Supp. at 886. This quote is out of context. The Leo Sheep Court was responding to the familiar canon of construction concerning federal land grants that any doubts "are resolved for the Government, not against it." 440 U.S. at 682. The Court quoted Denver & Rio Grand Ry. Co. to the effect that the familiar rule of strict construction should not be used to defeat the intent

of the legislature. Leo Sheep, 440 U.S. at 682-83. Thus, the "more liberal construction" adopted by the Court in Leo Sheep was simply that which embodied, as accurately as possible, the intent of Congress.

9. The private appellees argue that although, as held in Leo Sheep, the government does not have access rights across land granted to the railroads, private parties who acquire government land would have access rights. This is an ingenious and novel theory, but we find nothing in the history of the land grant or the common law doctrine of easements by necessity to support it. An easement by necessity is created only if the necessity exists at the time the dominant tract is severed from the servient tract. 2 G. Thompson, Real Property § 363 at 398 (1980); Comment, Easements by Way of Necessity Across Federal Lands, 35 Wash. L. Rev. 105, 108-09 (1960). Because of the power of eminent domain, there was no necessity for the government at the time of the land grant. See Leo Sheep Co. v. United States, 440 U.S. 668, 679-81 (1979). We fail to see, therefore, how the

government's successors can claim an easement by necessity over lands held by the railroad or its successors.

10. This circuit has recognized two purposes behind the doctrine of easement by necessity. Besides being a rule of construction used to derive the grantor's intent, it effectuates the public policy favoring land utilization. Superior Oil, 353 F.2d at 36-37. See also 3 Powell, supra, ¶ 410 at 34-59, 34-60. We note that the public policy favoring land utilization is not as directly at issue in this case as is usual in easement by necessity cases. Here, the conflict is between two different types of use of the government land, whether it will be protected as wilderness or opened up to more commercial use through the building of the access roads. Burlington Northern will get access to timber land regardless, either to the land it now owns, should Congress decide not to give the area Wilderness status, or to land received in exchange from the Secretary of Agriculture. 16 U.S.C. § 1134(a). See notes 2 and 7 & text accompanying supra. This type of decision on the

desirability of different types of land use is best made by the agency responsible for managing public lands and not by the courts applying common law doctrines. For this reason, the Attorney General has concluded that the doctrine of easement by necessity should not be applied against the sovereign. Op. Att'y Gen., slip at 17 (June 16, 1980).

Indeed, because Burlington Northern will have a statutory remedy to its access problem--the exchange provision of § 1134(a)--there is some question whether a necessity exists which would trigger the easement by necessity doctrine. It is unclear, however, whether Burlington Northern can initiate the land exchange before the potential wilderness land in the "Taylor-Hilgard Wilderness Area" is actually classified as wilderness. See 16 U.S.C. § 1134(a); § 2(b), Montana Wilderness Study Act of 1977, Pub. L. 95-150, 91 Stat. 1243; 16 U.S.C. § 1132(b) & (d); H.R. Rep. No. 95-620, 95th Cong., 1st Sess. 6 (1977).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* *

MONTANA WILDERNESS ASSOCIATION, NINE QUARTER CIRCLE RANCH, and THE WILDERNESS SOCIETY,	)	
Plaintiffs-Appellants,	)	No. 80-3374
vs.	)	D.C. No. 79-29-Bu
UNITED STATES FOREST SERVICE, JOHN McGUIRE, its chief; LEWIS HAWKES, Gallatin National Forest Supervisor; UNITED STATES FISH AND WILDLIFE SERVICE; HARRY WILLOUGHBY, its regional director; BURLINGTON NORTHERN, INC., a Delaware corporation; BOB BERGLAND, Secretary of Agriculture,	)	OPINION
Defendants-Appellees,	)	
and	)	
THE NATIONAL FOREST PRODUCTS ASSOCIATION,	)	
Intervening Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Montana
W. D. Murray, District Judge, Presiding
Argued and Submitted February 9, 1981

Before: ANDERSON and NORRIS, Circuit Judges; and SCHWARZER,* District Judge.

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

NORRIS, Circuit Judge:

Environmentalists and a neighboring property owner seek to block construction by Burlington Northern of roads over parts of the Gallatin National Forest. They appeal from a partial summary judgment in the district court granting Burlington Northern a right of access to its totally enclosed timberlands. Montana Wilderness Association v. United States Forest Service, 496 F. Supp. 880 (D. Mont. 1980). The district court held that Burlington Northern has an easement by necessity or, alternatively, an implied easement under the Northern Pacific Land Grant of 1864. Id. at 883-88. The defendants argue that the Alaska National Interest Lands Act of 1980, passed subsequent to the district court's decision, also grants Burlington Northern assured access to its land. The appellants contend that the doctrine of easement by necessity does not apply to the sovereign, that there was no implied easement conveyed by the 1864 land grant, and that the access provisions of the Alaska Lands Act do not apply to land outside the state of Alaska. We conclude that the Alaska Lands Act does grant access to Burlington Northern. We therefore affirm the partial summary judgment and remand the case for further proceedings.

I.

Defendant-Appellee Burlington Northern, Inc. owns timberland located within the Gallatin National Forest southwest of Bozeman, Montana. This land was originally acquired by its predecessor, the Northern Pacific Railroad, under the Northern Pacific Land Grant Act of 1864, 13 Stat. 365. The Act granted odd-numbered square sections of land to the railroad, which, with the even-numbered sections retained by the United States, formed a checkerboard pattern.[1]

To harvest its timber, Burlington Northern in 1979 acquired a permit from defendant-appellee United States Forest Service, allowing it to construct an access road across national forest land. The proposed roads would cross the Buck Creek and Yellow Mules drainages, which are protected by the Montana Wilderness Study Act of 1977, Pub. L. 95-150, 91 Stat. 1243, as potential wilderness areas. The proposed logging and road-building will arguably disqualify the areas as wilderness under the Act.

The plaintiffs, Montana Wilderness Association, The Wilderness Society, and Nine Quarter Circle Ranch, having contested the granting of the permit, filed

suit after it was granted, seeking declaratory and injunctive relief. A temporary restraining order was granted. Before the scheduled preliminary injunction hearing, the Forest Service suspended the permit and submitted the legal question of Burlington Northern's right of access to the Attorney General. The case lay dormant until Attorney General Civiletti issued his opinion. Op. Att'y Gen., slip at 1 (June 23, 1980). Of the three theories given in support of Burlington Northern's right of access, the Attorney General rejected two--that there is a right of access under the Forest Service Organic Administrative Act of 1897, 16 U.S.C. § 478, and that Burlington Northern has an easement by necessity--but left open the issue whether Burlington Northern has an implied easement under the Northern Pacific Land Grant of 1864.

After the Attorney General's opinion was issued, the Forest Service reconsidered the case, and reinstated the permit on the grounds that Burlington Northern had an assured right of access under the 1864 land grant.[2] The parties immediately filed cross-motions for summary judgment on the assured access issue. The district court denied the plaintiffs' motion and granted the defendants' partial summary judgment motion. The order for partial summary judgement was designated as final for purposes of appeal pursuant to Fed. R. Civ. P. 54(b).

During the pendency of this appeal, construction of an access road through the Buck Creek drainage has proceeded to such extent that it is unclear whether completion of the road will cause any more environmental

damage than has occurred already.[3] In any case, the appeal is not moot because the construction of access roads through the Yellow Mules drainage has not yet begun.

II.

The sole issue on appeal is whether Burlington Northern has a right of access across federal land to its inholdings of timberland. Appellees contend that the recently enacted Alaska National Interest Lands Conservation Act (Alaska Lands Act), Pub. L. No. 96-487, 94 Stat. 2371 (1980), establishes an independent basis for affirming the judgment of the district court. They argue that § 1323(a) of the Act requires that the Secretary of Agriculture provide access to Burlington Northern for its enclosed land.

Section 1323 is a part of the administrative provisions, Title XIII, of the Alaska Lands Act. Appellees argue that it is the only section of the Act which applies to the entire country; appellants argue that, like the rest of the Act, it applies only to Alaska. Section 1323 reads as follows:

> Sec. 1323. (a) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

> (b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the responsible use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.

This section provides for access to nonfederally-owned lands surrounded by certain kinds of federal lands. Subsection (b) deals with access to nonfederal lands "surrounded by public lands managed by the Secretary [of the Interior]." Section 102(3) of the Act defines "public lands" as certain lands "situated in Alaska." Subsection (b), therefore, is arguably limited by its terms to Alaska, though we do not find it necessary to settle that issue here. Our consideration of the scope of § 1323(a) proceeds under the assumption that § 1323(b) is limited to Alaska.

Subsection (a) deals with access to nonfederally-owned lands "within the boundaries of the National Forest System." The term "National Forest System" is not specifically defined in the Act.

The question before the court is whether the term "National Forest System" as used in § 1323(a) is to be interpreted as being limited to national forests in Alaska or as including the entire United States. We note at the outset that the bare language of § 1323(a) does not, when considered by itself, limit the provision of access to Alaskan land. We must look, however, to the context of the section to determine its meaning.

Elsewhere in the Act, Congress used the term "National Forest System" in a context which refers to and deals with national forests in Alaska. Title V of the Act is entitled "National Forest System." Section 501(a) states: "The following units of the National Forest System are hereby expanded . . . ." It is not unreasonable to read Section 1323(a) as referring to the "National Forest System" in the context in which it is used in Title V of the Act, rather than to all national forests in the United States.

Congress did, however, supply us with a general definition of the term in another statute. Pub. Law 93-378, 88 Stat. 480 (1974). 16 U.S.C. § 1609(a) states inter alia that:

> Congress declares that the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of their section to include all such areas into one integral system. The 'National Forest System' shall include all national forest lands reserved or withdrawn from the public domain of the United States,
>
> . . . .

Application of this definition to § 1323(a) would necessarily yield the conclusion that the section was intended to have nation-wide effect. This seems especially so when Congress uses the term "National Forest System" in § 1323(a) without limitation or qualification.

As the parties agreed at oral argument, however, § 1323(b) is in pari materia with § 1323(a). The two subsections are placed together in the same section, and use not only a parallel structure but many of the same words and phrases. The natural interpretation is that they were meant to have the same effect, one on lands controlled by the Secretary of Agriculture,

the other on lands controlled by the Secretary of Interior. Since we assume that § 1323(b), by definition of public lands in § 102(3), applies only to Alaskan land, we face a presumption that § 1323(a) was meant to apply to Alaska as well.

That interpretation is supported by a review of the entire Act which discloses no other provision having nation-wide application.[4] We therefore conclude that the language of the Act provides tentative support for the view that § 1323(a) applies only to national forests in Alaska. Bearing in mind that "[a]bsent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive," Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980), we turn to the legislative history.

The legislative history concerning § 1323 is surprisingly sparse.[5] The report of the Senate committee which drafted the section is ambiguous.[6] At times when the Senate could have been expected to comment on its intention to make a major change in current law, it did not.[7] The only expression of intent that § 1323 apply nation-wide came from a

single senator eight days after the Alaska Lands Act was passed by Congress.[8] In the House debates, three representatives suggested that § 1323 did apply nation-wide, but the chairman of one of the responsible committees said it did not.[9] Two chairmen of House subcommittees responsible for the bill did state in a letter to the Attorney General that they believe that § 1323 applied nation-wide, but there is no indication that the contents of this letter were generally known by members of the House, and so the letter carries little weight in our analysis.[10] All this gives only slight support at best to the appellees' interpretation that § 1323 applies nation-wide.

The appellees, however, have uncovered subsequent legislative history that, given the closeness of the issue, is decisive. Three weeks after Congress passed the Alaska Lands Act, a House-Senate Conference Committee considering the Colorado Wilderness Act interpreted § 1323 of the Alaska Lands Act as applying nation-wide:

> Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.

> The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act.

H.R. Rep. No. 1521, 96th Cong., 2d Sess., 126 Cong. Rec. H11687 (daily ed. Dec. 3, 1980) (emphasis supplied).

This action was explained to both Houses during discussion of the Conference Report. See 126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980) (remarks of Sen. Hart); Id. at S15573 (remarks of Sen. Armstrong); Id. at H11705 (daily ed. Dec. 3, 1980) (remarks of Rep. Johnson). Both houses then passed the Colorado Wilderness bill as it was reported by the Conference Committee.

Although a subsequent conference report is not entitled to the great weight given subsequent legislation, Consumer Product Safety Commission v. GTE Sylvania, 477 U.S. 102, 118 n.13 (1980), it is still entitled to significant weight, Seatrain Shipbuilding Corp. v. Shell Oil Co., 100 S.Ct. 800, 814 (1980), particularly where it is clear the the conferees had carefully considered the issue. See Consumer Product

Safety Commission, supra, at 120; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The conferees, including Representatives Udall and Sieberling and Senator Melcher, had an intimate knowledge of the Alaska Lands Act.[11] Moreover, the Conference Committee's interpretation of § 1323 was the basis for their decision to leave out an access provision passed by one house. In these circumstances, the Conference Committee's interpretation is very persuasive. We conclude that it tips the balance decidedly in favor of the broader interpretation of § 1323.[12] We therefore hold that Burlington Northern has an assured right of access to its land pursuant to the nationwide grant of access in § 1323.

III.

The federal appellees argue that the passage of the Alaska Lands Act moots this appeal and that this court is accordingly required to dismiss it and vacate the partial summary judgment of the district court. See Great Western Sugar Co. v. Nelson, 422 U.S. 92, 93-94 (1979). The private appellees argue that the Alaska Lands Act is at most an alternate ground for upholding the partial summary judgment, and so would

not moot the appeal.[13]

We conclude that the Alaska Lands Act did not moot this appeal, but is merely an alternate ground for upholding the district court. The enactment of new law during an appeal "ordinarily calls simply for application of the new law." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3533 at 276. The exception is that an attack on a statute will be mooted by new legislation which eliminates the aspects of the old law which gave rise to the challenge. Id. at 276-78. See, e.g., Allee v. Medrano, 416 U.S. 802 (1974); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972). Here the new legislation, the Alaska Lands Act, did not render pointless the resolution of the access issue raised by Montana Wilderness in its complaint below, as happens when an attacked statute is repealed. The new legislation in this case merely provided a new ground for resolving the access issue on appeal. We therefore find that this appeal is not moot.

The partial summary judgment of the district court is AFFIRMED and the case REMANDED to the district court.

1. For a more complete discussion of the history of the railroad land grants, see Leo Sheep Co. v. United States, 440 U.S. 668 (1979); Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942); United States v. Northern Pacific Ry. Co., 311 U.S. 317 (1940); and Platt v. Union Pacific Ry., 99 U.S. 48 (1878).

2. If Burlington Northern does not have an enforceable right of access, the protected status of the federal land may remove the Secretary of Agriculture's usual discretion to grant access over Forest Service land. Section 3(a), Montana Wilderness Study Act, Pub. L. 95-150, 91 Stat. 1243 (1977). Burlington Northern's remedy would be the eventual exchange of its inholdings for other federal land of comparable value. 16 U.S.C. § 1134(a); H.R. Rep. No. 95-620, 95th Cong., 1st Sess. 6 (1977).

3. A preliminary injunction to halt the construction was denied by the district court, and by this court on appeal.

4. The appellees concede that no other section of the Act applies nationwide. They argue, however, that because another provision of the Act, § 1110(b), gives access rights to all Alaskan inholders, § 1323(a) is superfluous unless it is interpreted to apply to the entire country. Section 1110(b), they argue, like § 1323(b), applies only to Alaska because it uses terms, "public lands" and "conservation system unit," which are defined to include only Alaskan land.

The flaw in appellees' argument is that however § 1323(a) is interpreted, § 1110(b) essentially duplicates the protection given Alaskan lands by § 1323 as a whole. Section 1110(b) overlaps § 1323(b) just as much as it overlaps § 1323(a). If, as appellees claim, § 1110(b) gives access to all Alaskan inholders and § 1323(a) gives access to holders of land surrounded by land administered by the Secretary of Agriculture, the inclusion of § 1323(b) in the Act makes no sense at all. Section 1323(b), after all, gives access to holders of Alaskan land surrounded by land administered by the

Secretary of the Interior. Under this view, not only is § 1323(b) superfluous in light of § 1110(b), it is paired with a provision, § 1323(a), of parallel structure but widely different scope. We do not see how the existence of § 1110(b) gives much support to the appellees' position.

5. Section 1323 was added to the Alaska Lands Bill by the Senate Committee on Energy and Natural Resources in its amendment to H.R. 39, originally passed by the House. S. Rep. No. 96-413, 96th Cong. 1st Sess. (1979), reprinted in [Feb. 1981] U.S. Code Cong. & Ad. News 9130. It was incorporated in the Tsongas substitute bill which replaced by amendment the Energy Committee's proposed bill, 126 Cong. Rec. S11099, S11140 (daily ed. Aug. 18, 1980). The Tsongas substitute bill was passed by the Senate, 126 Cong. Rec. S11193 (daily ed. Aug. 19, 1980), and House, 126 Cong. Rec. H10552 (daily ed. Nov. 12, 1980), and became law on December 1, 1980, 94 Stat. 2371.

6. The Energy Committee report discussed it in its section-by-section analysis, S. Rep. No. 96-413

at 310, [Feb. 1981] U.S. Code Cong. & Ad. News at 9314. (The Committee analysis mixes up §§ 1323 and 1324. Thus, the analysis entitled § 1324 is really concerned with § 1323 and vice versa.) Although the appellees contend that the language of the Energy Committee report makes perfectly clear the Committee's intent that § 1323 apply nationwide, we do not find their interpretation of the report's language persuasive:

> This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands. It has been the Committee's understanding that such owners had the right of access to their lands subject to reasonable regulation by either, the Secretary of Agriculture in the case of national forests, or by the Secretary of the Interior in the case of public lands managed by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976. However, a recent District Court decision in Utah (Utah v. Andrus et al., C79-0037, October 1, 1979, D.C. Utah) has cast some doubt over the status of these rights. Furthermore, the Attorney General is currently reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and the Interior.
>
> * * * * *

> The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access [across] National Forests and public land, subject, of course, to reasonable rules and regulations.

S. Rep. No. 96-413 at 310, [Feb. 1981] U.S. Code Cong. & Ad. News at 9314.

While the Committee's intent to guarantee access is clear, it is less than clear whether this provision was meant to guarantee access outside of Alaska. The problem raised in the first paragraph--the differing interpretations of the law of access--is not confined to Alaska, but the scope of the remedy as set forth in the last paragraph could be so confined. As with § 1323 itself, the report uses indiscriminately terms defined in the Act as applying only to Alaskan land ("public land") and terms not so defined ("National Forests").

The absence of any reference to Alaska is not of much import. The report's discussion of other access provisions such as § 1110 and § 1111, which all parties agree apply only to Alaska,

fails to mention Alaska and is as ambiguous about whether § 1110 and § 1111 apply nationwide as is the discussion of § 1323. S. Rep. No. 96-413 at 299-300, [Feb. 1981] U.S. Code Cong. & Ad. News at 9303-04.

7. The Alaska Lands bill was discussed endlessly on the Senate floor. There are numerous occasions when one would expect a change in current laws of access of the magnitude of the appellees' proposed interpretation of § 1323 to be discussed, mentioned or at least alluded to. Yet we have not found in the Senate debates, and appellees have not called to our attention, one single suggestion that anything in the Alaska Land Bill would affect access rights in the rest of the country. In Senator Tsongas' long, detailed comparison of his substitute bill with the Energy Committee bill, § 1323 is not mentioned. 126 Cong. Rec. S11193 (daily ed. Aug. 19, 1980). In discussion about the adequacy of the substitute bill's access provisions (which include § 1323) no mention is made of a change in the law of access for the rest of the country. 126

Cong. Rec. S11061-62 (daily ed. Aug. 18, 1980).

Neither did Senator Tsongas remark on § 1323 when it was first proposed in the Energy Committee bill, even though in his statement in the Committee report he spends several pages criticizing the bill's overbroad provisions on access. S. Rep. No. 96-413 at 422-24, [Feb. 1981] U.S. Code Cong. & Ad. News at 9422-23 (additional views of Senators Metzenbaum and Tsongas). Yet the extension of § 1323(a) to the entire country would certainly have a greater impact than the other measures he discusses.

8. Senator Melcher, the author of the section, discussed it on the floor of the Senate, 126 Cong. Rec. S14770-71 (daily ed. Nov. 20, 1980). The remarks of Senator Melcher, however, were made on November 20th, eight days after Congress passed H.R. 39. His remarks clearly demonstrate that his personal understanding of the section is that it applies nationwide, but because they are the remarks of but one senator made subsequent to the passage of the bill they do not provide a reliable indication of the under-

standing of the Senate as a whole.

9. On October 2, 1980, Representative Udall, chairman of the Committee on Interior and Insular Affairs which had joint responsibility for the bill, introduced an amendment one section of which was to "make clear that [the bill] applies only to Alaska." 127 Cong. Rec. 10376 (daily ed. October 2, 1980). This amendment was never adopted. Representative Udall subsequently declared in prepared remarks inserted into the Congressional Record that although the final version of the bill was "ambiguously drafted and not expressly limited to Alaskan lands, the House believes that, as with all the other provisions of the bill, the language of the section applies only to lands within the State of Alaska." 126 Cong. Rec. H10549 (daily ed. Nov. 12, 1980). Representative Weaver stated that the section granting access rights to inholders on national forest and BLM lands "apparently applies not only to Alaska but also to the entire United States." 126 Cong. Rec. H8638 (daily ed. September 9, 1980).

Representative Sieberling inserted into the record a summary of proposed amendments, which refers to Section 1323 as the "nationwide access amendment." 126 Cong. Rec. H10350 (daily ed. October 2, 1980). Representative AuCoin stated that one of the flaws of the final bill is that it "grants private inholders carte blanche access across national forest and public lands nationwide." 126 Cong. Rec. H10529-30 (daily ed. Nov. 12, 1980).

10. Appellees rely heavily upon an exchange of letters between Representatives Sieberling and Weaver, chairmen of the subcommittees responsible for the bill (Public Lands of the Committee on Interior and Insular Affairs and Forest of the Committee on Agriculture), and the representatives express concern over § 1323, which they state applies nationwide, and ask for a clarification of how different the § 1323 access language is from existing access provisions. It is indeed clear from their letter that they believed that § 1323 applies nation-wide.

Appellees argue, on the basis of the

September 5, 1980 return letter from Assistant Attorney General Alan Parker, that the Department of Justice confirmed this interpretation of § 1323. We interpret the letter differently. As we read the letter, the Assistant Attorney General assumed without analysis that the representatives' interpretation of § 1323 was correct, and proceeded to discuss in detail the effect of such a change in the law.

The exchanged letters are entitled to little weight. In general, off-the-record views of congressmen are not attributed to Congress as a whole. See T.V.A. v. Hill, 437 U.S. 153, 190-91 (1978). This is particularly true where, as here, there is no indication that the House as a whole was aware of the correspondence. Id. at 191-92.

11. The participation of Representive Udall is particularly noteworthy since he was the one congressman to proclaim in the legislative history of the Alaska Lands Act that § 1323 applied only to Alaska.

12. We recognize a facial problem or tension between 1323(a) and a portion of § 5 (a) of the Wilderness Act, 16 U.S.C. § 1134(a). We need not decide in this case whether there is repeal by implication. In passing, we note only that it is arguable that the two can stand together. § 1134(a) deals specifically with right of access '[i]n any case where State-owned or privately-owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness . . . .' (emphasis added). § 1323(a), on the other hand, deals with '. . . access to non-federally owned land within the boundaries of the National Forest System . . .' § 1134(a) is addressed specifically to an area designated as 'wilderness,' while § 1323(a) is addressed to National Forest System lands in general. In cases involving wilderness areas, the Secretary has the option of exchanging land of equal value so that the wilderness area may be preserved. Thus, § 1134(a) could be construed to apply in the specific case of a wilderness area, and § 1323(a) could be con-

strued to apply in all other cases.

Whether or not they are in fact irreconcilable we leave to another case when the issue is squarely presented for review.

13. The private appellees also claim that this court should decide the land grant issue. A right of access under the 1864 land grant is "broader" than a right of access under the Alaska Lands Acts, they contend, because it could not be rescinded. We need not decide the issue whether Burlington Northern has access under the 1864 land grant. Burlington Northern has not identified any respect in which its current right of access under the land grant would be any different than access under the Alaska Lands Act. Since this appeal arose on the plaintiffs' motion for summary judgment on the issue whether Burlington Northern has a current right to access, the question of access upon a hypothetical future event, the repeal of the statutory right of access, is not before us for decision.

Appendix

81-942

No._____

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ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1981

Montana Wilderness Association, Nine Quarter Circle Ranch, and The Wilderness Society,

Petitioners,

- vs -

United States Forest Service; John McGuire, its Chief; Lewis Hawkes, Gallatin National Forest Supervisor; United States Fish and Wildlife Service; Harvey Willoughby, its Regional Director; Burlington Northern Inc., a Delaware Corporation; Bob Bergland, Secretary of Agriculture,

Respondents,

and

The National Forest Products Association,

Intervening Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

Supplemental Appendix

JAMES H. GOETZ, ESQ.
Goetz, Madden & Dunn, P.C.
P. O. Box 1322
Bozeman, Montana 59715
Telephone: (406) 587-0618

Attorneys for Petitioners

SUPPLEMENTAL APPENDIX

This Supplemental Appendix contains the opinion of the District Court of September 11, 1980, in Montana Wilderness, et al. v. United States Forest Service, et al., 496 F.Supp. 880 (D. Mont. 1980). The opinion of the Ninth Circuit of May 14, 1981 and the opinion of the Ninth Circuit on rehearing of August 19, 1981 are setforth in the appendix which is part of the Petition for Writ of Certiorari.

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

* *

MONTANA WILDERNESS ASSOCIATION, NINE QUARTER CIRCLE RANCH, and the WILDERNESS SOCIETY,	)	
Plaintiffs,	)	No. 79-29-Bu.
v.	)	
UNITED STATES FOREST SERVICE, JOHN McGuire, its CHIEF; LEWIS HAWKES, Gallatin National Forest Supervisor; UNITED STATES FISH AND WILDLIFE SERVICE, HARRY WILLOUGHBY, its regional director; BURLINGTON NORTHERN, INC., a Delaware corporation; BOB BERGLAND, Secretary of Agriculture,	)	Sept. 11, 1980
Defendants.	)	

MEMORANDUM OPINION

WILLIAM D. MURRAY, Senior District Judge

I. INTRODUCTION

Plaintiffs bring this action against several federal defendants and Burlington Northern, Inc., seeking a preliminary injunction and moving for partial summary judgment. The court denied the motion for preliminary injunction and will issue findings of fact and conclusions of law in a separate order.

This memorandum opinion is to address those legal issues raised by the various motions and cross-motions for partial summary judgment. Prior to addressing those issues, a brief explanation of the controversy will be undertaken, followed by a historical discussion and a synopsis of the instant litigation.

A. Factual Background

Defendant Burlington Northern owns property in the Buck Creek and Yellow Mules drainages within the confines of the highly scenic Gallatin National Forest southwest of Bozeman, Montana, and plans to conduct logging activities on that property. In order to reach

its property and carry out the proposed logging Burlington Northern must construct a road across National Forest lands.

The Buck Creek and Yellow Mules drainages are within the Taylor-Hilgard Wilderness Study Area which has been set aside by Congress under the Montana Wilderness Study Act of 1977, P.L. 95-150, 91 Stat. 1243, for further study and Congressional consideration regarding its potential for wilderness designation. Burlinton Northern's plans to log portions of its property within the boundaries of the area would disqualify that area from possible wilderness designation. For that reason, among others, plaintiffs seek to prevent construction of the proposed logging road.

The national forest sections over which the road is to be constructed are intermingled with Burlington Northern sections in what is generally known as a "checkerboard" fashion. This pattern of ownership resulted from the grant of alternate sections by the United States to Burlington Northern's corporate

predecessor, Northern Pacific Railroad Co., under the Northern Pacific land grants of 1864. A brief discussion of the history of the Northern Pacific land grants and land grants to the railroads in general is undertaken below.[1]

B. Historical Background

On July 2, 1864, an act creating the Northern Pacific Railroad Company and authorizing that company to construct a railroad from Lake Superior to Puget Sound was enacted. 13 Stat. 365. That Act was the outgrowth of a tremendous desire on behalf of the federal government that the West be settled.

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[1]Decisions containing fuller historical discussions of the railroad land grants include, Leo Sheep Co. v. United States, 440 U.S. 668, 99 S. Ct. 1403, 59 L. Ed. 2d 677 (1979; Great Northern Ry. Co. v. United States, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942); United States v. Northern Pacific Ry. Co., 311 U.S. 317, 61 S. Ct. 264, 85 L. Ed. 210 (1940); and Platt v. Union Pacific Ry., 99 U.S. 48, 25 L. Ed. 424 (1878).

Railroads through the unsettled territories were the means to accomplish this goal. Yet private investors were unwilling to build the railroads without substantial governmental inducement. Inducement came in the form of an enormous grant of public land to the Northern Pacific Railroad Company, which was typical of other Congressional land-grant subsidies to railroads in that era. See, Leo Sheep Co. v. United States, 440 U.S. 668, 99 S. Ct. 1403, 59 L. Ed. 2d 677 (1979).

Under the terms of the 1864 Act, Northern Pacific was granted every alternate section of public land, not mineral, to the amount of twenty sections per mile on each side of the line through territories and ten sections per mile through the states. In case any of these sections had been occupied by homesteaders or otherwise disposed of at the time of definite location of the railroad, Northern Pacific was entitled to select, in lieu thereof, alternate odd-numbered sections not more than ten miles beyond the limits of the grant. In

lieu of mineral lands, the company was given the right to select a like quantity of agricultural land "nearest to the line of such road and within fifty miles thereof." 13 Stat. 365, Sec. 3.[2]

The checkerboard ownership pattern came about as a result of opposition to the railroad land grants from strict constructionists who believed that the Constitution provided no authority for the direct use of government funds for internal improvements, such as railroads. Leo Sheep, supra, 671-674, 99 S.Ct. 1405-1407. The opponents were ultimately persuaded, however, by the argument that construction of the railroads and the resulting development of the alternate sections granted to the railroads would lead to an appreciation in value of the retained federal lands. It was claimed, therefore, that the land grants

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[2]The provisions of the Act are well summarized in United States v. Northern Pacific Railway Co., 311 U.S. 317, 61 S.Ct. 264, 85 L.Ed. 210 (1940).

were not a direct federal subsidy but rather were a means of increasing federal revenues from the sale of the retained lands. Thus, the checkerboard ownership pattern, now pervasive in the West, was created.

C. The Instant Litigation

In order to construct the proposed road across federal land Burlington Northern applied for and was granted a special use permit by the Forest Service. Following administrative appeal of the decision to issue the permit, plaintiffs filed the instant lawsuit on May 9, 1979, seeking a temporary restraining order and preliminary injunction against construction of the road by Burlington Northern. This court granted the temporary restraining order and scheduled a hearing on the motion for preliminary injunction for September 4, 1979.

In the interim, however, the Forest Service, at the request of the Department of Justice, suspended the permit and the hearing

was vacated. Thereafter, the Secretary of Agriculture requested a formal opinion from the Attorney General to resolve the many questions which had arisen regarding the access rights of landowners whose land, like Burlington Northern's, is completely surrounded by property owned by the United States.

On June 23, 1980, the Attorney General issued his formal Opinion responding to the questions posed by the Secretary of Agriculture In that Opinion, the Attorney General concluded that 16 U.S.C. § 478 upon which the Forest Service had previously relied to find a right of access did not provide such a right. He further stated that "a right of access may be implied from the terms of the federal grant only if Congress intended to grant the right." Op. Atty. Gen. at 1-2 (June 23, 1980).

The Department of Agriculture thereafter determined that Burlington Northern has a right of reasonable access implicit in

the 1864 land grant and directed the Forest Service to reinstate Burlington Northern's permit, which was done July 30, 1980. Plaintiffs then filed motions for a temporary restraining order, preliminary injunction and motions for partial summary judgment. The court granted the temporary restraining order, but denied the motion for preliminary injunction. This opinion deals with Plaintiffs' motion for partial summary judgment and the cross-motions of both federal defendants and Burlington Northern for partial summary judgment.

II. BURLINGTON NORTHERN HAS ACCESS TO ITS PROPERTY BY WAY OF NECESSITY

Defendant Burlington Northern contends that it has an easement by necessity across the federal lands to reach its own, and has moved for summary judgment on that issue. The motion is resisted by federal defendants and plaintiff, both of whom rely to a great extent on Attorney General Civiletti's Opinion of June 23, 1980. In that opinion the Attorney

General addressed the precise issue here presented and concluded that:

> "the common law doctrine of easement by necessity does not apply to land owned by the federal government." Op. Atty. Gen. at 2(June 23, 1980).

[1] While it is true that opinions of the Attorney General are given great weight, an Attorney General's opinion is not the judgment of a court of law and is not binding on this court. Pueblo of Taos v. Andrus, 475 F.Supp. 359, 365, n. 4 (D.D.C. 1979). In this instance his conclusion as to the doctrine of easements by necessity must be rejected and Burlington Northern's motion for summary judgment granted.

Plaintiffs contend that the recent United States Supreme Court decision in Leo Sheep Co. v. United States, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979) controls this court's decision. The federal defendants and Burlington Northern, while conceding the applicability of Leo Sheep, persuasively argue that it is not controlling. A review of the decision is necessary.

Petitioners were livestock companies holding certain odd-numbered sections of land in Wyoming as successors in fee of the Union Pacific Railroad, which had received the land under the Union Pacific Act of 1862, 12 Stat. 489. The government retained the even-numbered sections, creating a checkerboard ownership pattern. The issue presented was whether the United States held an implied easement to build a road across the private land to provide access to a public reservoir. The landowners refused to allow the construction.

Prior to reaching what it considered as the critical issue in the case-whether the government had an implied easement based on the original land grant-the Court considered the question of whether the government had an easement by necessity across the private land. The Court described easement by necessity as follows:

> Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted

> property if such passage is necessary to reach the retained property. These rights-of-way are referred to as "easements by necessity." 440 U.S. at 679, 99 S.Ct. at 1409.

The Court proceeded to hold that the government could not avail itself of the doctrine. The major reason for that conclusion was that "the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain." Id. at 679-680, 99 S.Ct. at 1410. The Court stated that "[t]he applicability of the doctrine of easement by necessity in this case is, therefore, somewhat strained, and ultimately of little significance." Id. at 680-681, 99 S.Ct. at 1410.

Plaintiffs argue that the Leo Sheep holding that the easement by necessity doctrine is not available to the United States is binding on this court's determination of whether the doctrine may be applied against the United States. Such is not the case for the Leo Sheep holding that the doctrine of easement by necessity does not apply to the

sovereign was based on the fact that the government has the power of eminent domain if it requires access. Burlington Northern has no such power. It is apparent, then, that Leo Sheep does not settle the question of whether an easement by necessity can apply against the sovereign. It is therefore necessary to examine the few decisions which have dealt with the issue.

Under common law it was assumed that a grantor of property intended to include in the conveyance whatever was necessary for the beneficial use and enjoyment of the property. Mackie v. United States, 194 F.Supp. 306, 308 (D. Minn. 1961). The preliminary issue this court must decide is whether that common law assumption applies to lands granted by the United States. In Mackie the court seems to have simply assumed that an easement by necessity accompanied the government's grant of a patent to the plaintiff's predecessor. The issue was not directly dealt with, however, because the court found the

element of necessity lacking due to the availability of an alternate access route.

Two Ninth Circuit cases have recognized that easements by necessity could be derived from land grants by the federal government. Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir. 1965) recognized this impliedly while the issue was spoken to in a footnote in United States v. Dunn, 478 F.2d 443 (9th Cir. 1973). In Dunn, the dissent argued that an easement by necessity could not be binding on the United States. In a footnote, Id. at 444, n. 2, the court stated that while in its judgment the point had not been raised, the court "nevertheless did give it due consideration and concluded that it lacked merit." (citing) 3 Powell, Real Property, 443-444, and Superior Oil Co. v. United States, supra. While neither of these cases are controlling they are, at a minimum, persuasive on the issue of whether a way of necessity can exist against the government.

[2] Neither the case law on the issue nor the reasons set forth by plaintiffs convince this court that an easement by necessity cannot be asserted against the government. Whether or not the easement actually exists is the next inquiry.

[3] There are three prerequisites to the creation of an easement by necessity.[3] First, the titles to the two tracts in question must have been held by one person. Second, the unity of title must have been severed by a conveyance of one of the tracts. Third, the easement must be necessary in order for the owner of the dominant tenement to use his land. This necessity must exist both at the time of the severance of title and at the time of exercise of the easement.

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[3] See generally, 3 Powell on Real Property § 410 (1979); 2 Thompson on Real Property § 363, at 424-27 (1961 and 1978 Supp.); Comment, Easements By Way of Necessity Across Federal Lands, 35 Wash. L. Rev. 105, 107 (1960).

[4] In this instance all three factors are established. Prior to the Northern Pacific Railroad land grant in 1864 the United States held title to all of the land. The land grant severed the unity of title. And, finally, due to the checkerboard ownership pattern, easement was and is necessary for access to the property.

While the prerequisites of the common law easement by necessity doctrine are satisfied in this case, that does not of itself establish the easement. This court must look to the intent of the parties to the conveyance and the purposes of the conveyance. Superior Oil Co. v. United States, 353 F.2d 34, 36 (9th Cir. 1965).[4] In this case, that is ascertained by looking to the purposes of the 1864 land grant, 13 Stat. 365. While a more detailed analysis of the granting statute

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[4]See also, Kinscherff v. United States, 586 F.2d 159, 161 (10th Cir. 1978); Utah v. Andrus, 486 F.Supp. 995, 1002 (D. Utah 1979).

appears in Section III below, several observations must be made here which compel the conclusion that Congress intended, or at least expected, that grantees of its land would enjoy a right of access by way of necessity.[5]

As we discussed in Section I B above, the overriding purpose of the railroad land grants was to induce private companies to undertake the task of building the transcontinental railroad. The Act granting lands to the Northern Pacific Railroad Company stated its purpose was one of "aiding in the construction of said railroad and telegraph line to the Pacific Coast," 13 Stat. 365, § 3. Without the land grants as inducement the railroads would not have been built, for as

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[5]These observations are also relevant to the discussion of the implied easement issue in Section III below.

Horace Greeley stated: "The amount is too vast; the enterprise too formidable; the returns too remote and uncertain." Cited in Leo Sheep v. United States, 440 U.S. 668, 671, n. 3, 99 S.Ct. 1403, 1406, n. 3, 59 L.Ed. 2d 677.

For that reason Congress granted enormous amounts of land to the Northern Pacific Railroad Company. Without access to those lands, they would be worthless - a barren gift. Thus, it can be assumed that Congress intended that the grantees of the land also be given a right of access to use that land.

The court's decision does not rest on this logical assumption alone, for it was assumed at common law that a grantor intended to include in the conveyance whatever was necessary for the use and enjoyment of the land in question. Mackie v. United States, 194 F.Supp. 306, 308 (D. Minn. 1961). This general assumption was known to Congress at the time of the 1864 land grant, and the Act was passed with this assumption as background.

[5] Furthermore, a railroad land grant is to "receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted." Leo Sheep v. United States, 440 U.S. at 683, 99 S.Ct. at 1411, quoting United States v. Denver and Rio Grande Ry. Co., 150 U.S. 1, 14, 14 S.Ct. 11, 15, 37 L.Ed. 975 (1893). The overriding purpose of the land grants was to induce the railroad companies to build railroads, in order that the West be settled and developed. Absent a right of access, the entire congressional scheme would have been frstrated. The grantees could not have utilized the timber on the property, the land would have little value for sale, and settlement would thereby have been retarded.

It is apparent, then, that Burlington Northern has an easement by necessity to cross federal land to reach its own. The common law doctrine of easement by necessity may be applied against the United States when, as here, doing so will effectuate the purposes

of the original land grants to the railroad. A more detailed analysis of those purposes is undertaken below.

III. BURLINGTON NORTHERN HAS AN IMPLIED RIGHT OF ACCESS

The Attorney General, in his opinion of June 23, 1980, stated that:

> "[a] right of access may be implied from the terms of a federal land grant only if Congress intended to grant the right. This intent may be shown from the circumstances surrounding the grant, including the purpose for which it was made." Op. Atty. Gen. at 2 (June 23, 1980).

[6] As explained in the introduction, the Forest Service reinstated Burlington Northern's special use permit on the grounds that "Burlington Northern has a right of reasonable access to its lands implicit in the original statutory grant by Congress to the Northern Pacific Railroad in 1864." The federal defendants and Burlington Northern move for summary judgment as to this issue. The motions must be granted.

Throughout the following analysis it is important to keep in mind the canon of con-

struction controlling this court's review. As stated in Section II, supra, a railroad land grant "should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted." Leo Sheep Co. v. United States, 440 U.S. 668, 683, 99 S.Ct. 1403, 1411, 59 L.Ed.2d 677, quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14, 14 S.Ct. 11, 15, 37 L.Ed. 975 (1893).

In order to determine whether Congress intended to impliedly grant a right of access to those lands granted to the Northern Pacific in 1864, the court must look to the words of the granting statute and its legislative history. In this case, however, such an inquiry is fruitless, for neither the language of the statute, 13 Stat. 365, nor the extensive Congressional debates mentions the question of access to the granted lands. It is necessary, then, to "look at the condition of the counrty when the grant was made, as well as the declared purpose of the grant."

Op. Atty. Gen. at 20, citing Leo Sheep, supra, 440 U.S. at 682, 99 S.Ct. at 1411; Winona & St. Peter R.R. v. Barney, 113 U.S. 618, 625, 5 S.Ct. 606, 609, 28 L.Ed. 1109 (1885); and Platt v. Union Pacific R.R., 99 U.S. 48, 64, 25 L.Ed. 424 (1878).

The historical background of the Northern Pacific land grant is set forth in Section I, supra. A review of that history indicates the importance that Congress attached to the construction of the railroads. Settlement and development of the West was of paramount importance, and Congress felt a railroad necessary to accomplish the task. The benefits Congress expected to come of a transcontinental railroad were myriad, including general strengthening of the country through settlement and increased taxation, increased military defense capabilities, food, mineral resources, and development of foreign commerce. (Remarks of Rep. Sweat in debate on the Northern Pacific's land grant bill, Cong. Globe, 38th Cong., 1st Sess. at 1701-

have access to the land.

Plaintiffs attempt to escape this conclusion by arguing that Congressional intent on the issue of access is inconclusive. This argument the court must reject for all the reasons set forth above. Plaintiffs further argue that Congress intended to deal with rights of access by statute rather than by implication and point to two specific acts of Congress to support their conclusion; Section 8 of the Act of July 26, 1866, 14 Stat. 253, and the Organic Act of June 4, 1897, now codified at 16 U.S.C. § 478. Neither of these statutes support plaintffs' position.

The 1866 statute, enacted two years after the 1864 Northern Pacific land grant, provided: "The right of way for construction of highways over public lands, not reserved for public uses is hereby granted.[6]

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[6]The 1866 statute, 14 Stat. 253, later codified as 43 U.S.C. § 932, was repealed in 1976 by the Federal Land Policy and Management Act, Pub.L. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793.

Plaintiffs argue that this statute is "clear evidence" that Congress intended to deal with the question of access over federal lands "by statute rather than via dubiously applicable common-law doctrines of implied easements or ways of necessity." As demonstrated by Section II of this court's opinion, the common-law doctrine of ways of necessity is directly applicable.

[7] More importantly, however, there are two reasons plaintiffs' argument must be rejected. First, in construing railroad land grants, the court "must look to the condition of the country when the acts were passed, ..." Winona & St. Peter R.R. C. v. Barney, 113 U.S. 618, 625, 5 S.Ct. 606, 609, 28 L.Ed. 1109 (1885). The intent of the 1864 Congress cannot be definitively ascertained by examining congressional action taken in 1866. See, Platt v. Union Pacific R. Co., 99 U.S. 48, 63-64, 25 L.Ed. 424 (1878); Leo Sheep Co. v. United States, 404 U.S. 668, 677, n. 13, 99 S.Ct. 1403, 1408, 59 L.Ed.2d 677 (1979).

Second, the legislative history of the 1866 statute is silent as to its intended meaning. In United States v. Dunn, 478 F.2d 443 (9th Cir. 1873), however, the court, in discussing the statute, stated:

> Suffice to say that the statute was passed to protect persons who have already encroached upon the public domain without authorization but who have been allowed to remain there with the knowledge and acquiescence of the government and who should not in conscience be deemed trespassers. It was not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefensible. That such is its purpose is clear.

Id., at 445, n. 2.

Plaintiffs also point to the Organic Act of 1897, supra, to support their argument. To the degree that plaintiffs ask this court to divine the intent of the 1864 Congress from Congressional action thirty-three years later, the plea must be rejected. Furthermore, the 1897 Act was enacted after Congress had soured on the idea of the railroad land grants. As the Supreme Court noted in Great Northern Ry. Co. v. United States, 315

U.S. 262, 275, 62 S.Ct. 529, 534, 86 L.Ed. 836 (1942), there was a "sharp change in Congressional policy with respect to railroad grants after 1871, ..." Thus, the 1897 Organic Act provides no support for the proposition forwarded by plaintiffs that Congress intended to provide access to the granted lands by statute.

The conclusion that Congress intended a right of access to the granted lands is inescapable. Given the rule of liberal construction in interpreting railroad land grants, Leo Sheep, 440 U.S. at 683, 99 S.Ct. at 1411, and the clear Congressional intent that the granted lands be settled and developed, the court must conclude that Congress intended that Northern Pacific (or its successors) have access to the granted lands. The motions of the federal defendants and Burlington Northern as to this issue must be granted.

IV. BURLINGTON NORTHERN'S RIGHT OF ACCESS IS ONE OF THOSE RIGHTS PROTECTED UNDER 16 U.S.C. § 478.

Burlington Northern contends that its

right of access was recognized and reaffirmed by the second sentence of 16 U.S.C. § 478. That statute states:

> "Nothing . . . [herein] . . . shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locatin, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests."

[8] There is no question that Burlington Northern has no right of access pursuant to the first sentence of 16 U.S.C. § 478, for it is not an "actual settler." Under the second sentence of that statute, however, Burlington Northern's pre-existing right of access is recognized. A review of the history of that Act shows that one reason Congress

passed the Act was to make clear the pre-existing access rights of owners of lands surrounded by federal lands were not to be impaired by the establishment of the national forest system.

In 1891, a law authorizing the President to reserve forest lands from the public domain was enacted. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103. On February 22, 1897, President Cleveland, pursuant to the 1891 Act, issued proclamations placing some twenty million acres of public land in forest reserves. For a discussion of this action, see Op. Atty. Gen. at 6-7 (June 23, 1980).

In response to President Cleveland's action, which outraged Congressmen from states affected by the proclamations, Congress passed what is now codified as 16 U.S.C. § 478. As stated by the Attorney General, Op. Atty. Gen. at 9 (June 23, 1980), a review of the legislative history "demonstrates that the effect of the second sentence of § 478 is to protect whatever rights and licenses

with regard to the public domain existed prior to the reservation." The Attorney General further stated that "[t]he language grants no rights not already in existence." Id.

As established above, Burlington Northern, as successor to the Northern Pacific, enjoys a right of access dating back to the 1864 land grant. Thus, 16 U.S.C. § 478 merely protects what is a pre-existing right. If that right of access did not already exist by way of implication or as an easement by necessity, the statute would be of no effect.

To the extent that 16 U.S.C. § 478 has been relied upon by the Forest Service and Burlington Northern as creating an absolute right of access, that reliance is misplaced. See, Op. Atty. Gen. at 2 (June 23, 1980). The mere fact that a person is an inholder does not entitle him to access under 16 U.S.C. § 478, and the Forest Service retains discretionary authority to deny such access, provided that a right of access does

not otherwise exist. Id. In this case, however, such a right of access does exist.

To the extent it is not inconsistent with the above discussion, Burlington Northern's motion for partial summary judgment as to access under 16 U.S.C. § 478 is granted.

V. CONCLUSION

[9] For all of the reasons stated above the court holds that Burlington Northern does have a right of access to its property across federal lands. The exercise of that right is, of course, not absolute. Under the Constitution, Congress has the authority and responsibility to manage federal land. U.S. Const. Art. IV, § 3, cl. 2. Congress has by statute delegated this authority to agencies such as the Forest Service, e. g., the Federal Land Policy and Management Act, 43 U.S.C. § 1701, et seq. The United States, as the holder of the servient tenement, has the right to limit the location and use of Burlington Northern's easement of access, to that which is necessary for Bur-

lington Northern's reasonable enjoyment of that right. Thus, although Burlington Northern must be allowed access to its property, the United States may regulate that access under statutes such as the Federal Land Policy and Management Act. See, Utah v. Andrus, 486 F.Supp. 995 (D. Utah 1979). In this case the United States, through the Forest Service, has so regulated Burlington Northern's access through conditions placed on the special use permit.

For all of the above reasons,

IT IS ORDERED that defendant Burlington Northern's cross-motions for partial summary judgment as to the issues of easement by necessity and implied easement are granted. Its motion as to its right of access pursuant to 16 U.S.C. § 478 is granted insofar as it is not inconsistent with the court's discussion in Section IV above.

IT IS FURTHER ORDERED that the federal defendants' cross-motion for partial summary judgment on the implied easement

issue is granted. Its cross-motions for summary judgment as to the issues of easement be necessity and the issue of access under 16 U.S.C. § 478 are denied.

IT IS FURTHER ORDERED that plaintiffs' motions for summary judgment as to all three issues are denied.

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of November, 1981, served the foregoing Supplemental Appendix upon all parties by carbon copies thereof to be sent by first class U.S. mail, postage prepaid, to the offices of their attorneys, as listed below:

Wade H. McCree, Jr.
Solicitor General
United States Department of Justice
Ben Franklin Station
Room 5143
Main Justice Building
Washington, D.C. 20044

Dirk D. Snel, Esquire
Land & Natural Resources Division
Department of Justice
Ben Franklin Station
P. O. Box 7415
Washington, D.C. 20044

Attorneys for Federal Defendants-
Appellees

Kurt W. Kroschel, Esquire
Regional Counsel
Law Department
Burlington Northern, Inc.
First Northwestern Bank Center
175 North 27th Street, Suite 1003
Billings, Montana 59101
(406) 657-8387

Attorney for Defendant-
Appellee Burlington Northern

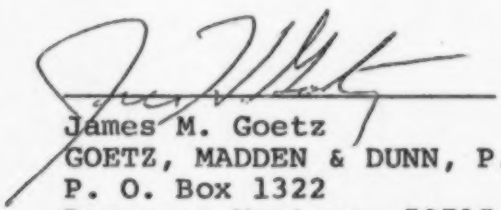
David Booth Beers
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for National
Forest Products Association

Rich Anderson, Esquire
Assistant U.S. Attorney
United States Attorney's Office
167 Federal Building
Butte, Montana 59701
(406) 723-6561

Michael H. Hyer, Esuire
Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

Attorneys for Amicus Curiae
Mountain States Legal Foundation



James M. Goetz
GOETZ, MADDEN & DUNN, P.C.
P. O. Box 1322
Bozeman, Montana 59715
(406) 587-0618

Attorneys for Petitioner

Opposition



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CLERK

No. 81-942

In The

Supreme Court of the United States

October Term, 1981

Montana Wilderness Association, Nine Quarter Circle Ranch, and The Wilderness Society,

Petitioners,

vs.

United States Forest Service; John McGuire, Its Chief; Lewis Hawkes, Gallatin National Forest Supervisor; United States Fish and Wildlife Service; Harvey Willoughby, Its Regional Director; Burlington Northern Inc., a Delaware Corporation; Bob Bergland, Secretary of Agriculture,

Respondents,

and

The National Forest Products Association,

Intervening Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION BURLINGTON NORTHERN RAILROAD COMPANY

FRANK S. FARRELL
Counsel of Record

KURT W. KROSCHEL
650 Central Building
Seattle, WA 98104
(206) 625-6534

Attorneys for Respondent Burlington Northern Railroad Company

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the access provisions of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, apply to lands located within areas enumerated in the Montana Wilderness Study Act of 1977, Pub. L. No. 95-150.

PARTIES

The Petition for Writ of Certiorari suggests that since the proceedings in the Court below were held there have been several changes in the identities of individuals filling governmental positions. In addition, effective 14 May 1981, a corporate reorganization occurred wherein the name of Burlington Northern Inc. was changed to Burlington Northern Railroad Company (hereinafter sometimes "BN" or "Burlington Northern"). Pursuant to Rule 28.1 of the Revised Rules of the United States Supreme Court, a list of the parent, subsidiary and affiliated corporations of BN is set forth in Appendix A to this Brief.

TABLE OF CONTENTS

Pages

Counterstatement of Questions Presented i

Parties i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statute Involved 2

Counterstatement of the Case 2

Reasons for Denying the Writ:

1. There Are No Special or Important Reasons for Granting the Writ in This Case. 7

2. The Alaska Act Interpretation of the Court Below Was Correct. 9

Conclusion 12

Appendices

Appendix A—Parent, Subsidiaries and Affiliates of Burlington Northern Railroad Company ..... App. 1

Appendix B—Affidavit of William J. Parson 8 December 1980 ..... App. 3

Appendix C—Affidavit of William J. Parson 4 December 1981 ..... App. 7

TABLE OF AUTHORITIES

Pages

CASES:

Montana Wilderness Association v. United States Forest Service (D. Mont. 1980), 496 F. Supp. 880 ..... passim

Montana Wilderness Association v. United States Forest Service (9th Cir. 1981), Case No. 80-3374 (presently unreported; Appendix B to Petition) ..... passim

Rice v. Sioux City Cemetery, (1954) 349 U. S. 70, 99 L. Ed. 897, 75 S. Ct. 614 8

STATUTES AND RULES:

Alaska National Interest Lands Conservation Act, P. L. 96-487, 94 Stat. 2371 ..... 3, 4, 6, 7, 8, 9, 11, 12

Colorado Wilderness Act, Pub. L. No. 96-560, 94 Stat. 3265 ..... 11, 12

Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U. S. C. § 1609 (a) 10

Montana Wilderness Study Act of 1977, P. L. No. 95-150, 91 Stat. 1243 ..... 4, 6, 8

Northern Pacific Land Grant of 1864, 13 Stat. 365 ..... 3, 6

Supreme Court of the United States Rules, Rule 17 (c) 7

Supreme Court of the United States Rules, Rule 28.1 i

Wilderness Act, 16 U. S. C. § 1134 ..... 4, 9

TABLE OF AUTHORITIES—Continued

Pages

MISCELLANEOUS:

Senate Rep. No. 686, 93rd Cong. 2d Sess. 21-22 (1974) 10

H. R. Rep. No. 1521, 96th Cong., 2d Sess., 126 Cong. Rec. H11687 (daily ed. Dec. 3, 1980) 11

126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980) 12

126 Cong. Rec. S15573 (daily ed. Dec. 4, 1980) 12

126 Cong. Rec. H11705 (daily ed. Dec. 4, 1980) 12

No. 81-942

In The

Supreme Court of the United States

October Term, 1981

Montana Wilderness Association, Nine Quarter Circle Ranch, and The Wilderness Society,

Petitioners,

vs.

United States Forest Service; John McGuire, Its Chief; Lewis Hawkes, Gallatin National Forest Supervisor; United States Fish and Wildlife Service; Harvey Willoughby, Its Regional Director; Burlington Northern Inc., a Delaware Corporation; Bob Bergland, Secretary of Agriculture,

Respondents,

and

The National Forest Products Association,

Intervening Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION BURLINGTON NORTHERN RAILROAD COMPANY

OPINIONS BELOW

The yet-unreported opinion of the United States Court of Appeals for the Ninth Circuit is reproduced at pages B-1 through B-25 of the Appendix to the Petition, and was filed on 19 August 1981. An opinion of the United States Court of Appeals for the Ninth Circuit, withdrawn and replaced by the above-mentioned opinion, was filed on 14 May 1981 and appears at pages A-1 through A-33 of the

Appendix to the Petition. The Opinion of the United States District Court for the District of Montana, Butte Division, was filed on 11 September 1980, was reported at 496 F. Supp. 880 and appears in the Supplementary Appendix filed by Petitioners with this court on or about 30 November 1981.

JURISDICTION

The jurisdictional statement contained in the Petition is adequate.

STATUTE INVOLVED

The statement of statutes involved contained within the Petition is adequate.

COUNTERSTATEMENT OF THE CASE

Respondent BN offers the following counterstatement of facts:

The Nature of the Suit

Initially, this action involved the general right of a landowner to reach its landlocked property over the lands of its grantor. In this instance, the landowner is Burlington Northern Railroad Company and the grantor is the

United States of America.[1] During the greater part of the proceedings leading to this petition stage, the issue facing the courts was whether Burlington Northern was entitled to access its property pursuant to the venerable common law doctrines of easement by implication or way of necessity. However, just as answering briefs to the Ninth Circuit were being polished, Congress passed and the President signed the Alaska National Interest Lands Conservation Act (the "Alaska Act"),[2] legislation containing the following provision dealing with the problem of access to private property over United States lands:

> "SEC. 1323 (a) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided,* That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.
>
> (b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act

---

[1]The grant in question is the Northern Pacific Land Grant of 1864, 13 Stat. 365. By that grant Northern Pacific Railroad Company, predecessor in interest to BN, received lands from the United States as an aid and inducement to construction of a transcontinental railroad. The pattern of grant, what has been referred to as a "checkerboard," causes the landlocking that has given rise to this suit.

[2]HR 39 passed into law and became Pub. L. No. 96-487 when signed by President Carter on 2 December 1980.

of 1976 (43 U. S. C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to access across public lands."

With passage of the Alaska Act, the Court below found it unnecessary to deal with broad common law access right questions. It correctly viewed the case as one involving rights under a specific statutory scheme. The question became one of statutory construction. Moreover, the Court deduced, and correctly so, that it was operating in an even more constricted area. The specific road involved in the litigation was rapidly coming to completion.[3] And, the major impediment to the road construction was a statute, the Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243 (the "Montana Study Act"), with limited geographical impact and about to expire by its own terms.[4]

Thus, what began as a rather broad-based access suit constricted into a question involving the effect of one statute upon another in a limited factual context.[5]

---

[3]See Appendices B and C to this brief containing affidavits of William J. Parson, the BN agent charged with responsibility for completion of the road construction.

[4]Section 2(a) of the Montana Study Act gave the Secretary of Agriculture a limited period of time, five years, to review certain designated lands and to report to the President as to suitability for preservation as wilderness. That period will expire on 1 November 1982.

[5]Ever since passage of the Alaska Act, Petitioners have attempted to induce the courts to speculate on the effect the Alaska Act might have on various pieces of legislation including Section 5(a) of the Wilderness Act, 16 U. S. C. § 1134(a). The Ninth Circuit recognized that the Alaska Lands' effect upon Wilderness Act provisions is not raised by this case and left those questions " . . . to another case when the issue is squarely presented for review." (Appendix to Petition, p. B25.)

The Background of the Suit

The Gallatin National Forest of Montana is a geographical area being ravaged by a pest called the mountain pine beetle (Ex. 1, p. 22, CR pp. 118-121). In May of 1975, in order to stem the beetle infestation and to properly develop its timber resource, Burlington Northern made application to the U. S. Forest Service for a permit to access its lands in the Buck Creek drainage of the Gallatin National Forest (Ex. 1, p. 14).

The administrative procedures were protracted and did not conclude until 30 July 1980, when BN received its permit. It immediately moved to construction of the Buck Creek Road. With issuance of the permit and commencement of road work, the court procedures here involved began in earnest. At the behest of the now petitioners, Montana Wilderness Association, *et al.*, the United States District Court for the District of Montana issued a temporary restraining order blocking implementation of the permit (CR 54). Motions for Preliminary Injunction and Partial Summary Judgment were set for hearing and were heard (CR 47, 48, 64 and 66).

After hearing, the District Court issued its Order denying preliminary injunction and holding that the plaintiffs ". . . failed to establish a strong likelihood of success on the merits." (CR 73).

In its supporting Memorandum Opinion, the Court concluded that the common law doctrines of easement by necessity and easement by implication supported and required the grant of access rights across federal lands to BN holdings (Petitioners' Supplemental Appendix pp. SA9-27) and that such easement interests were "existing

private rights" which, pursuant to the Montana Study Act, were entitled to recognition.[6] Both the District Court and the Circuit Court were asked to stay BN road construction pending appeal. Both Courts declined (CR 77 and Circuit Court Order of 23 September 1980).

It was at this point that Congressional action in the form of the Alaska Act intervened. The Circuit Court ultimately concluded that Section 1323 of that Act was applicable to the federal lands here involved and that the Secretary of Agriculture was and is under a statutory obligation to provide BN, as well as others similarly situated, with access to their lands surrounded by National Forest property.[7]

Since the court determination of 19 August 1981 (Petition Appendix B-1 through B-25), two matters of note have occurred. First, Petitioners disdained any attempts to seek restraints pending this Petition for *Certiorari*. They

---

[6]Section 3(a) of the Montana Wilderness Study Act of 1977 reads:

> "Except as otherwise provided by this section, and *subject to existing private rights*, the wilderness study areas designated by this Act shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." (Emphasis added.)

[7]At pages A-1 through A-33 and B-1 through B-25 of the Appendix to Petition, Petitioners have set forth two opinions rendered by the Circuit Court in this case. The second opinion came about as a result of applications for rehearing made to the Court. By its second opinion, the Court limited itself to an evaluation of the Alaska Act and its interaction with the Montana Study Act. It properly declined to address the broader access questions raised under the 1864 land grant (Petition Appendix B-25).

evidently determined to leave BN free to construct its permitted access road. Second, BN moved forward and, as is demonstrated in Appendix C to this Brief, it has now moved to within two weeks of completion of its 7.3 mile road.

REASONS FOR DENYING THE WRIT

This is not a case where a conflict in decision on a matter of federal law has arisen. To the contrary, the Alaska Act with which we are dealing is of recent origin and, with the exception of this case, has not yet received testing, particularly in the area of Section 1323 access rights.

This is not a case involving a constitutional issue. It is a case involving a straightforward question of statutory construction. In the next two sections BN would like to make the following points:

(1) Although the present situation is of substantial importance to Burlington Northern, the factual situation does not raise the great national issues contended for by petitioners;

(2) The Court below correctly decided the issues.

1. There Are No Special or Important Reasons for Granting the Writ in This Case.

It appears to be the contention of Petitioners that this Court should grant *certiorari* under and pursuant to Rule 17 (c), Supreme Court Rules. It is claimed that the Federal Court of Appeals has decided an important question

of law which has not been, but should be, settled by this Court. The Petitioners assert that the Ninth Circuit has ruled that where a state or private inholder is involved ". . . the government must grant access in all cases . . ." (Petition p. 11). The Ninth Circuit decided no such thing.

It did nothing more than rule that, in a geographical area affected by the Montana Study Act, the Alaska Act dictates that inholders have private rights to access which must be recognized and honored. Moreover, this Court is asked to note that the Montana Study Act is an Act of limited scope. It applies to but a few geographical areas in the State of Montana. The time constraints of the Act are limited. Pursuant to its terms, the Secretary of Agriculture is only given until 1 November 1982, to review the subject lands and to report to the President his findings regarding suitability for preservation as wilderness.

This Court has held that where time may outmode the issue or issues in dispute it will not grant *certiorari*: *Rice v. Sioux City Cemetery,* (1954) 349 U. S. 70, 99 L. Ed. 897, 75 S. Ct. 614. It is submitted that the Montana Study Act is an Act of limited scope. It is an Act with a short life span, a span close to expiration. The effect of any determination of this Court, assuming grant of *certiorari*, would be extremely narrow.

The Court is also asked to note that the Ninth Circuit was careful to limit the effect of its decision. It did so in response to arguments made by Petitioners at the circuit level which were similar to those now made to this court. In its footnote 12 (Petition Appendix B-24 and B-25), the Court refused to be drawn into a discussion of the parameters of its decision. It noted that the relationship

between the Alaska Act and the Wilderness Act, 16 U. S. C. § 1134 *et seq.* had been raised. It refused to speculate on that relationship observing that the two acts could very well be compatible but that determination of compatibility should be left ". . . to another case when the issue is squarely presented for review." (Petition Appendix p. B-25). The Circuit Court refused to be drawn into speculation regarding the effect of the Alaska Act on such areas as wilderness lands or national parks. It is submitted that this Court should do likewise.

BN next addresses what almost amounts to a parenthetical observation by Petitioners, an observation which appears at page 6, footnote 3, of the Petition. Petitioners there recognize that to all intents and purposes the road into the Buck Creek drainage has been completed. (See the Parson Affidavits which appear as Appendices B and C to this Brief.) They then attempt to justify a granting of *certiorari* on another permit, the Yellow Mules Roads (Ex. 1) or upon "other access applications in the Gallatin National Forest." Other permits and other applications raise or may raise questions different from those here involved. More to the point, proceedings involving other permits or applications do not demonstrate the finality generally required of this Court in *certiorari* proceedings.

2. The Alaska Act Interpretation of the Court Below Was Correct.

Section 1323 (a) of the Alaska Act applies to the land here in question and the Circuit Court was correct in so holding. Pursuant to Section 1323 (a), the Secretary of Agriculture is required to provide access to ". . . non-fed-

erally-owned land within the boundaries of the National Forest System . . ." If "National Forest System" means lands throughout the United States rather than solely within the State of Alaska, BN is entitled to access its lands.

The Circuit Court properly observed that the term "National Forest System" has a clearly defined meaning emanating from Section 10 (a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA). What is now codified at 16 U. S. C. § 1609 (a) reads in appropriate part:

> "Congress declares that the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of their section to include all such areas into one integral system. The 'National Forest System' shall include all national forest lands reserved or withdrawn from the public domain of the United States, . . ."

The above definition was placed in the law in order to provide a general definition of "National Forest System." This is confirmed by a Senate Committee Report on RPA which reads:

> "Section 10.—National Forest System Defined: Subsection (a) places in law the definition of the lands that are considered to be a part of the system and incorporates the term 'National Forest System' into law. The lands in the national forests are of diverse origins; some are original public domain, others were purchased under laws, or secured by donation or exchange or other means. It is the purpose of this subsection to state that all lands administered by the Forest Service are, in fact, part of a National Forest System." (Senate Report No. 686, 93rd Cong. 2nd Sess. 21-22 [1974].)

Finally, the Circuit Court recognized that subsequent legislative history arising with reference to different but related legislation coming from the same Congress is highly persuasive in the area of legislative intent. Specifically, the Court noted that the 96th Congress which passed the Alaska Act, also passed the Colorado Wilderness Act, Pub. L. No. 96-560, 94 Stat. 3265.

Within three weeks of the passage of the Alaska Act, a House-Senate Conference Committee met to resolve differences on the Colorado Wilderness Act. One of the points of divergence was a provision in the Senate version pertaining to access. The House conferees claimed that a provision guaranteeing access to inholders was unnecessary in the Colorado legislation because the recently passed Alaska Act already provided such assurance on a nationwide basis. The conferees determined:

> "Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.
>
> The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act." H. R. Rep. No. 1521, 96th Cong., 2nd Sess., 126 Cong. Rec. H11687 (daily ed. Dec. 3, 1980).

The Court then noted two other factors which demonstrated the intent of Congress with reference to nationwide access. The conferees included Representatives Udall and Sieberling and Senator Melcher, all persons who had been closely related to the Alaska Bill and were fully aware of its meaning and purpose. Explanations of the Conference Report, including clear expositions on the re-

lationship between the nationally effective access provisions of the Alaska Act and the Colorado bill, were given to both houses of Congress.[8]

Thus, the Court below carefully and properly evaluated all evidence regarding the scope of the access provisions of the Alaska Act. It correctly found the access provisions to be nationally effective and therefore applicable to BN in this instance.

CONCLUSION

For the reasons set forth above, the Petition for *Certiorari* should be denied.

Respectfully submitted,

FRANK S. FARRELL
Counsel of Record

KURT W. KROSCHEL

650 Central Building
Seattle, Washington 98104
Telephone: (206) 625-6534

[8]The remarks of Senator Hart, 126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980), Senator Armstrong, 126 Cong. Rec. S15573 (daily ed. Dec. 4, 1980) and Representative Johnson, 126 Cong. Rec. H11705 (daily ed. Dec. 4, 1980) leave little doubt that the 96th Congress was under the clear impression it had passed, through Section 1323 of the Alaska Act, legislation bearing upon access throughout the United States and not just within the State of Alaska.

APPENDIX A

PARENT, SUBSIDIARIES AND AFFILIATES OF BURLINGTON NORTHERN RAILROAD COMPANY

Parent: Burlington Northern Inc.

Subsidiaries (except wholly-owned):

Camas Prairie Railroad Company

The Colorado and Southern Railway Company

Davenport, Rock Island and North Western Railway Company

Fort Worth and Denver Railway Company

Galveston Terminal Company

The Lake Superior Terminal and Transfer Railway Company

Minnesota Transfer Railway Company

NZ Development Company

NZ Properties, Inc.

Portal Pipe Line Company

Western Fruit Express Company

Winona Bridge Railway Company

Affiliates:

The Belt Railway Company of Chicago

Burlington Northern Air Freight (Aust.) Pty. Limited

Butte Pipe Line Company

Chicago Union Station

The Denver Union Terminal Railway Company

Houston Belt & Terminal Railway Company

Iowa Transfer Railway Company

Kansas City Terminal Railway Company

Keokuk Union Depot Company

Longview Switching Company

Paducah & Illinois Railroad Company

Portland Terminal Railroad Company

The Pueblo Union Depot and Railroad Company

The Saint Paul Union Depot Company

Terminal Railroad Association of St. Louis

Trailer Train Company

The Wichita Union Terminal Railway Company

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3374

DC# CV79-29 WDM

Montana (Butte)

MONTANA WILDERNESS ASSOCIATION, NINE QUARTER CIRCLE RANCH and THE WILDERNESS SOCIETY,

Plaintiffs-Appellants,

vs.

UNITED STATES FOREST SERVICE; JOHN MCGUIRE, its Chief; LEWIS HAWKES, Gallatin National Forest Supervisor; UNITED STATES FISH AND WILDLIFE SERVICE; HARVEY WILLOUGHBY, its Regional Director; BURLINGTON NORTHERN, INC., a Delaware Corporation and BOB BERGLAND, Secretary of Agriculture,

Defendants-Appellees,

and

THE NATIONAL FOREST PRODUCTS ASSOCIATION,

Intervening Defendants.

AFFIDAVIT OF WILLIAM J. PARSON

State of Montana, County of Gallatin, ss.

WILLIAM J. PARSON, being duly sworn, deposes and says:

1. He makes this Affidavit to bring the Court up-to-date on the progress of road construction under and pursuant to the Buck Creek Special Use Permit initially issued on 30 April 1979, and re-instated on 30 July 1980.

2. During the preliminary injunction hearing before U. S. District Court Judge W. D. Murray and specifically, on 18 August 1980, I testified that if Burlington Northern were permitted to immediately begin construction of its Buck Creek road it would complete construction by late next field season, the 1981 field season. (Testimony of William Parson, page 61, line 25 through page 62, line 7.)

3. I defined a field season, as applicable to the Buck Creek road, as that period of time commencing 15 July and running through the month of October. (William Parson Testimony, page 62, lines 8 through 25.)

4. On or about 27 August 1980, I received advice that the United States District Court, per Judge W. D. Murray, had declined to issue a preliminary injunction precluding Burlington Northern from proceeding with construction of its Buck Creek road and thereupon I arranged for immediate re-institution of road work.

5. Said work was re-instituted by our Contractor Evensen, Inc., on 28 August 1980.

6. Since that time the following has been completed:

a. The road has been pioneered and is driveable for its entire length, 7.3 miles;

b. Seventy-five percent of the right-of-way timber has been decked;

c. Seventy-five percent of the non-merchantable right-of-way debris has been piled for burning;

d. Ninety-five percent of the culverts have been installed; and

e. Seventy percent of the earthwork or excavation has been completed.

7. The 1980 field season has concluded and no further work will be accomplished until the 1981 field season.

8. The work completed to date has a contract value of eighty-seven thousand one hundred thirty-five and no/100 dollars ($87,135.00).

9. As the Burlington Northern employee directly responsible for the Buck Creek road construction program, I intend to commence work as soon after 15 July 1981 as weather permits.

10. In order to complete work on the road the following will have to be accomplished:

a. The decking of the right-of-way timber will have to be completed;

b. The piling of non-merchantable right-of-way debris will have to be completed;

c. The remainder of the culverts will have to be installed;

d. The earthwork or excavation work will have to be completed;

e. Right-of-way timber will have to be loaded and hauled from the premises;

f. The piled non-merchantable right-of-way debris will have to be burned; and

g. Cuts, fills and other exposed areas will have to be grass-seeded.

11. I still estimate, as I did during my testimony of 18 August 1980, that the road here in question will not be completed until on or about 31 October 1981; until that time the road will be unusable for timber management purposes.

12. In concluding this Affidavit I observe that field experience on road construction has confirmed that Burlington Northern, although it has made substantial progress on the Buck Creek road, will be unable to use the road for purposes of salvaging beetle-killed timber until after 31 October 1981.

Further your Affiant sayeth not.

/s/ William J. Parson

Subscribed and sworn to before me this 8 day of December, 1980.

/s/ D. V. Norris
Notary Public for the State of Montana. Residing at Bozeman, Montana. My Commission expires 8/29/81.

CERTIFICATE OF SERVICE

I, KURT W. KROSCHEL, Attorney for Burlington Northern Inc., hereby certify that I have served a true and correct copy of the attached Affidavit of William J. Parson upon all opposing counsel of record.

DATED this 11th day of December, 1980.

/s/ Kurt W. Kroschel

APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-942

MONTANA WILDERNESS ASSOCIATION, NINE QUARTER CIRCLE RANCH, AND THE WILDERNESS SOCIETY,

Petitioners,

vs.

UNITED STATES FOREST SERVICE; JOHN McGUIRE, ITS CHIEF; LEWIS HAWKES, GALLATIN NATIONAL FOREST SUPERVISOR; UNITED STATES FISH AND WILDLIFE SERVICE; HARVEY WILLOUGHBY, ITS REGIONAL DIRECTOR; BURLINGTON NORTHERN INC., A DELAWARE CORPORATION; BOB BERGLAND, SECRETARY OF AGRICULTURE,

Respondents,

and

THE NATIONAL FOREST PRODUCTS ASSOCIATION,

Intervening Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AFFIDAVIT OF WILLIAM J. PARSON

State of Montana, County of Gallatin, ss.

WILLIAM J. PARSON, being duly sworn, deposes and says:

1. I am employed as Manager—Forest Land, Gallatin Management Unit, BN Timberlands Inc., and in that position I am charged with responsibility for construction of the Buck Creek road which is and has been the subject of contention in the lawsuit within which this Affidavit is made.

2. On 8 December 1980, I made and executed an Affidavit which was filed in the United States Court of Appeals for the Ninth Circuit and which Affidavit set forth the progress to that date on the construction of the Buck Creek road.

3. The purpose of this Affidavit is to provide this Court with a current status report on the construction of the road.

4. On or shortly after 19 August 1981, I was advised that the United States Court of Appeals for the Ninth Circuit had affirmed the earlier determination of the United States District Court for the District of Montana, Butte Division, and that work on the Buck Creek road could resume.

5. I arranged for resumption of road construction efforts and on 1 September 1981, the road contractor, Evensen, Inc., began work continuing until interrupted by significant snowfall on 23 October 1981.

6. Because of weather conditions, the 1981 field season has concluded and no further road building will be accomplished until the 1982 field season.

7. As of the date of this Affidavit, the following work has been accomplished:

a. Clearing of right-of-way is ninety-five percent (95%) complete;

b. Grubbing (removal of stumps within the road prism) and piling of non-merchantable debris is ninety-five percent (95%) complete;

c. Excavation is ninety-five percent (95%) complete;

d. Culvert installation is ninety-five percent (95%) complete; and

e. Finishing (final smoothing of road surface) is sixty percent (60%) complete.

8. As of the date of this Affidavit, the contract value of work completed is one hundred thirty-nine thousand seven hundred ninety dollars and 70 cents ($139,790.70).

9. When work resumes on the road, it should take approximately two (2) weeks to finish the project.

10. In order to more completely advise the Court of the status of work, I indicate that the entire seven and three-tenths (7.3) mile length of the Buck Creek road is driveable; that all but the final three thousand (3000) feet of the project is essentially done, requiring finishing touches only; and that the last three thousand (3000) feet is approximately eighty percent (80%) complete.

11. As of the date of this Affidavit, a permit has been issued by the United States Forest Service for construction of the Yellow Mules road system. However, the engineering necessary to construction of this system has not been performed, contracts for the construction of the system have not been let, and at present no firm intent regarding initiation or timing of the project has been formed.

/s/ William J. Parson

Subscribed and sworn to before me this 4th day of December, 1981.

/s/ Teri Laeson

Notary Public for the State of Montana. Residing at: Belgrade. My commission expires: Aug. 1, 1984.

CERTIFICATE OF SERVICE

I, KURT W. KROSCHEL, hereby certify that I have sent a true and correct copy of the attached Affidavit of William J. Parson to all opposing counsel of record.

DATED this 11th day of December, 1981.

/s/ Kurt W. Kroschel

Opposition

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No. 81-942

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Supreme Court of the United States

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL FOREST PRODUCTS ASSOCIATION

DAVID BOOTH BEERS *
S. ELIZABETH GIBSON
JEFFREY C. MARTIN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

RICHARD S. WASSERSTROM
1619 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-5860

Counsel for Respondent National Forest Products Association

* Counsel of Record

January 15, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether § 1323(a) of the Alaska National Interest Lands Conservation Act, which assures access to private property within the boundaries of the National Forest System, applies throughout the United States.

Whether the Northern Pacific Land Grant Act of 1864 conveyed to the Northern Pacific Railroad and its successors a right of access to the granted lands across the surrounding federal lands.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT	2
ARGUMENT	7
I. THERE ARE NO "SPECIAL" OR "IMPORTANT" REASONS FOR THE COURT TO REVIEW THE FIRST JUDICIAL INTERPRETATION OF § 1323(a) OF THE RECENTLY ENACTED ALASKA LANDS ACT	7
A. The Decision Below Is Not in Conflict with the Decision of Any Other Court	7
B. The Decision Below Will Not Impair Proper Management of National Forest System Lands	8
C. The Court of Appeals' Interpretation of § 1323(a) Does Not Result in the Implied Repeal of § 5(a) of the Wilderness Act of 1964	9
THE COURT OF APPEALS' INTERPRETATION OF § 1323(a) OF THE ALASKA LANDS ACT AS APPLYING NATIONWIDE IS PLAINLY CORRECT	12
A. The Language of the Act Itself Reveals that Congress Intended the Provision to Apply to National Forest Lands Nationwide	12
B. The Legislative History of the Alaska Lands Act Supports the Interpretation of § 1323(a) as Applying Nationwide	16

TABLE OF CONTENTS—Continued

Page

C. This Congressional Intent Was Confirmed by the Action of the Same Congress in Deleting an Access Provision from the Colorado Wilderness Act in Reliance on § 1323 of the Alaska Lands Act 20

III. THE IMPLIED-EASEMENT AND EASEMENT-BY-NECESSITY ISSUES PRESENTED IN THE PETITION WERE NOT ADDRESSED BY THE COURT OF APPEALS AND DO NOT WARRANT THE GRANTING OF THE WRIT 24

CONCLUSION 25

APPENDICES:

A. National Forest Products Association's Direct Member Companies and Associations 1a

B. Order of the United States Court of Appeals for the Ninth Circuit, August 19, 1981 ..... 2a

TABLE OF AUTHORITIES

CASES: Page

Andrus v. *Shell Oil Co.*, 446 U.S. 657 (1980) 22
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 23
Leo Sheep Co. v. *United States*, 440 U.S. 668 (1979) 2, 9
Morton v. *Mancari*, 417 U.S. 535 (1974) 10
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572 (1980) 23
Sequoyah v. *TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) 10
United States v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) 23
United States v. *Will*, 449 U.S. 200 (1980) 12

STATUTES:

Act of October 13, 1964, 78 Stat. 1089, § 2, 16 U.S.C. § 533 (1976) 10
Alaska National Interest Lands Conservation Act, 94 Stat. 2371 (1980):
§ 102(3), 16 U.S.C.A. § 3102 (West 1980 Laws Spec. Pamph.) 15, 16
§ 501, 16 U.S.C.A. § 539 (West 1980 Laws Spec. Pamph.) 15
§ 505, 16 U.S.C.A. § 539b (West 1980 Laws Spec. Pamph.) 15
§ 708(b), 94 Stat. 2421 (1980) 15
§ 1323(a), 16 U.S.C.A. § 3210(a) (West 1980 Laws Spec. Pamph.) ..... *passim*
§ 1323(b), 16 U.S.C.A. § 3210(b) (West 1980 Laws Spec. Pamph.) 15, 16
Colorado Wilderness Act, Pub. L. No. 96-560, 94 Stat. 3265 (1980) ..... *passim*
Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U.S.C. §§ 1701-82 (1976) .. 10, 14, 15, 16

TABLE OF AUTHORITIES—Continued

Page

Forest and Rangeland Renewable Resources Planning Act of 1974, 88 Stat. 476 (1974):
§§ 2-5, 16 U.S.C. §§ 1601-04 (1976) 14
§§ 8 and 9, 16 U.S.C. §§ 1607-08 (1976) 14
§ 10(a), 16 U.S.C. § 1609(a) (1976) 6, 13, 14
Montana Wilderness Study Act of 1977, 91 Stat. 1243, 16 U.S.C. § 1132 note (Supp. III, 1979).... 3
National Forest Management Act of 1976, 90 Stat. 2949 (1976):
§§ 2-4, 16 U.S.C. §§ 1600-01 (1976) 14
§§ 6-9, 16 U.S.C. §§ 1606, 1608-09 (1976) 14
§ 11, 16 U.S.C. § 1612 (1976) 14
§ 14, 16 U.S.C. § 472a (1976) 14
§ 17, 16 U.S.C. § 521b (1976) 14
Northern Pacific Land Grant Act of 1864, ch. 217, 13 Stat. 365 (1864) 2, 4, 5, 24
Organic Administration Act of 1897, 30 Stat. 36, 16 U.S.C. § 478 (1976) 5, 10
Wilderness Act of 1964, § 5(a), 16 U.S.C. § 1134 (a) (1976) 9, 10, 11, 12

REGULATIONS:

36 C.F.R. § 293.12 (1981) 9, 11
36 C.F.R. § 212.8 (1981) 9

LEGISLATIVE MATERIALS:

S. Rep. No. 686, 93d Cong., 2d Sess. (1974) 14
H.R. Rep. No. 1724, 94th Cong., 2d Sess. (1976).... 14
S. Rep. No. 413, 96th Cong., 1st Sess. (1979), *reprinted in* [1980] U.S. Code Cong. & Adm. News, p. 5070 .....8, 11, 17
H.R. Rep. No. 1521, 96th Cong., 2d Sess. (1980).... 21
Oversight on the Montana Wilderness Study Act: Hearing Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources, 97th Cong., 1st Sess. (1981) (*"Montana Hearing"*):

TABLE OF AUTHORITIES—Continued

Page

Letter from Sen. John Melcher to all U.S. Senators (July 29, 1980), *Montana Hearing* 53 ..... *passim*
Memorandum from Mike Harvey to Sen. Melcher (Aug. 29, 1980), *Montana Hearing* 54 8
Letter from Reps. Weaver and Seiberling to Attorney General (Aug. 25, 1980) 18
Letter from Ass't Att'y Gen. Parker to Rep. Seiberling (Sept. 5, 1980) 11, 19
Alaska Lands Act Debates:
125 Cong. Rec. H3386 (daily ed. May 16, 1979) 18
126 Cong. Rec. S11099 (daily ed. Aug. 18, 1980) 18
126 Cong. Rec. S11140 (daily ed. Aug. 18, 1980) 18
126 Cong. Rec. S11203 (daily ed. Aug. 19, 1980) 18
126 Cong. Rec. H8638 (daily ed. Sept. 9, 1980) 18
126 Cong. Rec. H10350 (daily ed. Oct. 2, 1980) 19
126 Cong. Rec. H10529-30 (daily ed. Nov. 12, 1980) 19
126 Cong. Rec. H10549 (daily ed. Nov. 12, 1980) 19
126 Cong. Rec. H10552 (daily ed. Nov. 12, 1980) 19
126 Cong. Rec. S14770 (daily ed. Nov. 20, 1980) 20
Colorado Wilderness Act Debates:
125 Cong. Rec. H11685 (daily ed. Dec. 10, 1979) 20
126 Cong. Rec. S13471-13489 (daily ed. Sept. 25, 1980) 20
126 Cong. Rec. H11683-87 (daily ed. Dec. 3, 1980) 21, 22

TABLE OF AUTHORITIES—Continued

Page

126 Cong. Rec. H11704-05 (daily ed. Dec. 3, 1980) 22
126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980) 21
126 Cong. Rec. S15573 (daily ed. Dec. 4, 1980) 21, 22
126 Cong. Rec. S15576 (daily ed. Dec. 4, 1980) 21
126 Cong. Rec. S15578 (daily ed. Dec. 4, 1980) 22

OTHER AUTHORITIES:

43 Op. Att'y Gen. No. 26 (1980) 3, 4, 11
Fed. R. Civ. P. 54(b) 5
Sup. Ct. R. 17.1 7

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---

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL FOREST PRODUCTS ASSOCIATION [1]

OPINIONS BELOW

The opinion of the District Court (Supp. App. SA-1 - SA-33) is reported at 496 F. Supp. 880.[2] The original opinion of the Court of Appeals (Pet. App. A-2 - A-33), which was later withdrawn, is not reported. The final

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[1] Respondent National Forest Products Association ("NFPA") is a trade association made up of 12 direct member companies who manufacture numerous solid wood products and 33 local and specialized forest products associations, who are, in turn, made up of more than 2000 individual firms engaged in the forest products industry. The names of the direct member companies and associations of NFPA are listed in Appendix A to this brief.

[2] References to the Appendix to the Petition are cited as "Pet. App."; references to petitioners' Supplemental Appendix are cited as "Supp. App."

opinion of the Court of Appeals (Pet. App. B-2 - B-25), which supports the judgment of which review is sought, is reported at 655 F.2d 951.

STATEMENT

This case concerns the right of respondent Burlington Northern Railroad Company to build access roads across the Gallatin National Forest in Montana in order to reach its timber lands, which are surrounded by the federal property. Respondent United States Forest Service determined that Burlington Northern has a right of access across these federal lands and issued a permit authorizing Burlington Northern's construction of the access roads. Pet. App. B-4. Petitioners Montana Wilderness Association et al. ("MWA") brought this suit challenging that action by the Forest Service. The Court of Appeals affirmed the District Court's granting of respondents' motions for partial summary judgment, holding that Burlington Northern has an assured right of access. Pet. App. B-13. In so ruling, the Court of Appeals relied upon a provision of the Alaska National Interest Lands Conservation Act ("Alaska Lands Act"), 94 Stat. 2371 (1980), enacted while the case was on appeal, which requires the Secretary of Agriculture to provide adequate access to owners of land within the boundaries of the National Forest System. Pet. App. B-5 - B-12.

The lands to which Burlington Northern seeks access were acquired by the railroad's predecessor, the Northern Pacific Railroad, pursuant to the Northern Pacific Land Grant Act of 1864, 13 Stat. 365. Pet. App. B-3. Odd-numbered square sections of land granted to the railroad under this Act alternated with even-numbered sections of land retained by the United States, thus forming a "checkerboard" pattern. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672 (1979) (describing checkerboard pattern resulting from similar Union Pacific Land

Grant Act). The lands at issue in this lawsuit remain so arrayed today, and thus access to the privately owned lands requires crossing the surrounding federal lands.

In order to harvest its timber on the lands described above, Burlington Northern applied for a permit from the Forest Service to construct access roads across certain of the surrounding Gallatin National Forest Lands. Consistent with the Forest Service's longstanding policy of recognizing inholders' rights of access, it granted Burlington Northern a permit in 1979. Pet. App. B-3.

MWA commenced this lawsuit in May 1979, seeking injunctive and declaratory relief against the construction of the access roads. Pet. App. B-3 - B-4. They contended that the Forest Service had erroneously failed to exercise its discretion to deny the permit. They also alleged that the issuance of the permit violated the Montana Wilderness Study Act of 1977, 91 Stat. 1243, 16 U.S.C. § 1132 note (Supp. III, 1979), which requires, subject to existing private rights, that national forest lands covered by the Act be maintained in their presently existing character pending study by the Secretary of Agriculture of the land's suitability for wilderness preservation. Complaint Counts Two and Seven, Clerk's Record No. 2.[3] Shortly thereafter, the Secretary of Agriculture requested an opinion from the Attorney General on several related questions concerning owners' rights of access to private lands within the boundaries of national forests, and the Forest Service suspended Burlington Northern's permit while these issues were being reviewed. Pet. App. B-4.

Attorney General Civiletti issued his opinion in June 1980. 43 Op. Att'y Gen. No. 26. Although he disagreed

[3] MWA's complaint also asserted issues concerning the Forest Service's compliance with the Federal Land Policy and Management Act of 1976, the National Environmental Policy Act, and the Endangered Species Act. These issues are not involved in this proceeding.

with certain of the Forest Service's bases for concluding that inholders have a right of access, the Attorney General stated that a grantee of government lands is entitled to reasonable access across federal lands where such access right either expressly or implicitly arises from the act authorizing the particular land grant. *Id.* at 18. In the opinion, he did not examine particular federal land grant statutes in order to determine whether they conveyed rights of access; rather, he left that task for the Secretary. He did, however, note that certain types of land grants—including those to railroads—deserve a liberal construction in favor of the grantees because of the circumstances surrounding their passage. *Id.* at 21.

The Forest Service then reconsidered Burlington Northern's application for a permit to build its access roads in light of the principles set forth by the Attorney General. In July 1980, it reinstated the permit, on the ground that a right of reasonable access was implicit in the original land grant to Burlington Northern's predecessor under the Northern Pacific Land Grant Act. Pet. App. B-4.

Immediately thereafter, the parties to this lawsuit filed cross-motions for partial summary judgment on the issue whether Burlington Northern has an assured right of access to its lands. *Id.*[4] After denying MWA's motion for a preliminary injunction, the District Court granted the motion for partial summary judgment filed by Burlington Northern and granted in part the motion filed by the federal respondents. Supp. App. SA-32 - SA-33. In its opinion, the court cited three bases for holding that

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[4] NFPA had obtained leave to intervene as a defendant in this action. In support of its intervention motion, NFPA demonstrated its interest in the access question at issue by setting forth facts indicating that several of the firms or companies associated with it, including Burlington Northern, own lands which were originally granted by the Federal Government and which remain surrounded by federal lands. Motion of NFPA to Intervene as a Defendant, Clerk's Record No. 60.

Burlington Northern has a right of access to the lands in question: (1) the common-law doctrine of easement by necessity, pursuant to which the grantee of land completely surrounded by land retained by the grantor is presumed to have an easement to cross the grantor's land; (2) the 1864 Northern Pacific Land Grant Act, which the court determined implicitly granted rights of access to the granted lands; and (3) the Forest Service's Organic Administration Act of 1897, 16 U.S.C. § 478 (1976), which the court held recognized and protected the railroad's pre-existing access rights. Supp. App. SA-9 - SA-31. The District Court designated its order granting partial summary judgment final for purposes of appeal pursuant to Fed. R. Civ. P. 54(b). Pet. App. B-4.

While MWA's appeal from the District Court decision was pending, Congress enacted the Alaska Lands Act. Section 1323(a) of that statute, 16 U.S.C.A. § 3210(a) (West 1980 Laws Spec. Pamph.), which was signed into law on December 2, 1980, provides that the Secretary of Agriculture "shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof . . . ." (The full text of the provision appears at p. 13, n.13, *infra*.) NFPA therefore argued in the Court of Appeals that this provision provided an additional basis for affirming the judgment of the District Court. Br. for Appellee NFPA at 40-45.

On May 14, 1981, the Court of Appeals issued an opinion reversing the judgment of the District Court. Pet. App. A-26. It first held that § 1323(a) of the Alaska Lands Act applies only to National Forest System lands within Alaska. Stating that there is no generally accepted or statutory definition of the term "National Forest System," the court concluded that the meaning of that term in § 1323(a) is ambiguous. Pet. App. A-10. The court found support in other parts of the statute for

an interpretation of the term as being limited to Alaska. Pet. App. A-11. Although it found that the legislative history of this provision provided some support for respondents' position that § 1323(a) applies nationwide, it concluded that this support was insufficient to overcome the language of the statute, which the court believed was "more naturally read as applying only to Alaska." Pet. App. A-18. The court also rejected the bases on which the District Court had relied in holding that Burlington Northern has a right of access to its lands. Pet. App. A-19 - A-26.

Following issuance of the decision by the Court of Appeals, respondents filed petitions for rehearing and suggestions for rehearing in banc. Among other things, they pointed out that the term "National Forest System" is defined by 16 U.S.C. § 1609(a) (1976) as consisting of "units of federally owned forest, range, and related lands *throughout the United States* . . . ." (Emphasis supplied.) Moreover, NFPA brought to the court's attention highly illuminating action taken by Congress in the same session in connection with the Colorado Wilderness Act, 94 Stat. 3265 (Dec. 19, 1980). NFPA pointed out that an access provision was deleted from the final version of the Colorado Act because the same Congress understood § 1323 of the Alaska Act to apply nationwide. NFPA Pet. for Rehearing at 3-12.

After receiving from MWA a response to the petitions for rehearing, the Court of Appeals on August 19, 1981, issued an order granting the petitions for rehearing and withdrawing its May 14 opinion. (Order attached hereto as Appendix B.) The court that day issued a new opinion affirming the judgment of the District Court. Pet. App. B-13. In this opinion, which addressed only the Alaska Lands Act issue and did not reach the grounds relied upon by the District Court, the Court of Appeals held that § 1323(a) of the Act applies to national forest lands nationwide and provides Burlington Northern an assured

right of access to the lands in question. Pet. App. B-12. While finding the language and legislative history of the Alaska Lands Act inconclusive, the Court of Appeals concluded that Congress' deletion of an access provision from the Colorado Act, on the ground that access already had been assured by § 1323 of the Alaska Lands Act, which it had passed just three weeks before, demonstrated that Congress intended § 1323 to apply to national forest lands throughout the nation. Pet. App. B-12.

ARGUMENT

I. THERE ARE NO "SPECIAL" OR "IMPORTANT" REASONS FOR THE COURT TO REVIEW THE FIRST JUDICIAL INTERPRETATION OF § 1323(a) OF THE RECENTLY ENACTED ALASKA LANDS ACT.

Petitioners contend that the Court of Appeals decided an important and far-reaching question of federal law that should be reviewed by this Court. Pet. 8-15. As we show below, there are no "special" or "important" reasons, as required by Supreme Court Rule 17.1, for this Court to grant certiorari to review the Court of Appeals' decision that § 1323(a) of the Alaska Lands Act applies to National Forest System lands outside Alaska.

A. The Decision Below Is Not in Conflict with the Decision of Any Other Court.

The Alaska Lands Act became law on December 2, 1980, while this case was pending in the Court of Appeals. The Court of Appeals' decision is the first and, we believe, the only judicial interpretation to date of the access provision contained in § 1323(a) of the Act.[5] Accordingly, there is no conflict between the decision below and the decision of any other court. Moreover, as we

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[5] We also know of no other pending litigation involving this issue.

now demonstrate, petitioners have presented no other reason warranting the Court's immediate interpretation of such a new statute.

B. The Decision Below Will Not Impair Proper Management Of National Forest System Lands.

Contrary to petitioners' contention that the decision below will have "devastating consequences to the federal lands" (Pet. 8), the Court of Appeals' decision simply recognizes that Congress, in enacting § 1323(a), intended to confirm the Forest Service's longstanding policy of granting inholders access to their lands.[6] The right of access guaranteed by § 1323(a) is not, as MWA imply (Pet. 8-11), a right to be exercised unmindful of environmental values. Section 1323(a) grants an owner of private land within the boundaries of the National Forest System "such access . . . as the Secretary [of Agriculture] deems adequate to secure to the owner the reasonable use and enjoyment thereof." 16 U.S.C.A. § 3210(a). This right is subject to the proviso that the owner "comply with rules and regulations applicable to ingress and egress to or from the National Forest System." *Id.* Thus, the right of access granted inholders must be exercised consistently with reasonable Forest

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[6] The legislative history makes clear that Congress viewed enactment of § 1323 as an endorsement of the Forest Service's policy, followed for more than seventy years, of granting access to inholders. S. Rep. No. 96-413, 96th Cong., 1st Sess. 310 (1979), *reprinted in* [1980] U.S. Code Cong. & Adm. News, p. 5254; Letter from Sen. John Melcher to all U.S. Senators (July 29, 1980), *published in Oversight on the Montana Wilderness Study Act: Hearing Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 53 (1981) (*"Montana Hearing"*); Memorandum from Mike Harvey to Sen. Melcher (Aug. 29, 1980), *published in Montana Hearing* 54.

The issuance of Burlington Northern's permit was thus entirely in accordance with that historic policy.

Service regulations designed to preserve the environmental value of the federal land.[7]

MWA also assert that the decision below will "severely handicap[]" the Forest Service's ability to negotiate access to federal inholdings across private lands. Pet. 14. This fear is unwarranted. The Government's power to acquire access across private land through condemnation places it in a very strong position to negotiate needed access. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 680-82 (1979) (discussing the Government's ability to acquire access over private inholdings through condemnation and negotiation). Should negotiations fail, exercise of the authority to condemn ensures that federal lands will not be land-locked.

C. The Court of Appeals' Interpretation of § 1323(a) Does Not Result in the Implied Repeal of § 5(a) of the Wilderness Act of 1964.

MWA argue that the Court of Appeals' decision sanctions the repeal by implication of § 5(a) of the Wilderness Act of 1964, 16 U.S.C. § 1134(a) (1976)[8] (Pet. 10-

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[7] For example, one relevant Forest Service regulation provides that persons "who own land completely surrounded by National Forest Wilderness shall be given such rights as may be necessary to assure adequate access to that land. 'Adequate access' is defined as the combination of routes and modes of travel which will, as determined by the Forest Service, cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the . . . private land is held or used." 36 C.F.R. § 293.12 (1981). Another states that the Chief of the Service "shall grant appropriate access across National Forest" lands to inholders and that "[c]onstruction, reconstruction or maintenance of a road or highway requires written authorization." 36 C.F.R. § 212.8 (1981).

[8] Section 5(a) provides in relevant part:

> "In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be ex-

12), in contravention of the rule of statutory construction disfavoring repeals of earlier statutes "[i]n the absence of some affirmative showing of an intention to repeal." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974).[9] This contention is unsound.

First, § 1323(a) by its terms guarantees access to inholders "[n]otwithstanding any other provision of law . . . ." 16 U.S.C.A. § 3210(a). Accordingly, if the right of access guaranteed in § 1323(a) conflicts with any prior statute such as § 5(a), Congress' *expressed* intent is that § 1323(a) be given effect. *E.g.*, *Sequoyah* v. *TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (where Congress has directed construction of dam "notwithstanding . . . any other law," challenge to completion of dam based on other federal statutes is expressly foreclosed).

Second, the legislative history of § 1323(a) clearly indicates that Congress was aware that differing constructions of § 5(a) had divided the Government, and intended by enactment of § 1323(a) to resolve the issue. The Forest Service had taken the view that § 5(a) guarantees access to owners of land surrounded by federal wilderness unless the landowner voluntarily forgoes ac-

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changed for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture . . . ."

[9] MWA also assert that other important public land access provisions, 43 U.S.C. §§ 1761-1764 (1976), 16 U.S.C. § 533 (1976), and 16 U.S.C. § 478 (1976), "are either repealed by implication or significantly modified by implication as a result of the decision." Pet. 12 n. 5. The first two of the cited statutes authorize the Secretaries of Interior and Agriculture to grant rights-of-way over public lands and national forest lands. Section 1323(a) does not repeal these grants of authority. Instead, § 1323(a) merely guarantees rights-of-way to a limited class of the public—owners of inholdings. The third cited statute assures "actual settlers" a right of access across national forest lands. Section 1323(a) may expand the category of persons with express statutory access rights, but it does not affect or repeal the access rights of actual settlers under 16 U.S.C. § 478 (1976).

cess and accepts a land exchange. See 36 C.F.R. § 293.12 (1981). In June 1980, Attorney General Civiletti rejected this construction of § 5(a), ruling that the Wilderness Act requires only that either adequate access be given or an offer be made to the landowner to exchange the land for federal land of approximately equal value. 43 Op. Att'y Gen. No. 26 (1980). In adopting § 1323(a), Congress determined to overrule the Attorney General's opinion, and to endorse the Forest Service's longstanding practice.[10] Senator Melcher, the sponsor of § 1323, explained this purpose in a letter to each of his colleagues in the Senate:

> "Denying access would be a taking. To force landowners to make a land swap against their will would only be a modified taking but, yet, that is the alternative indicated by the Attorney General's opinion. Such confusion is completely unnecessary and is not conducive to sound land management practices for either the Forest Service or the Bureau of Land Management." Letter from Sen. John Melcher to all Senators (July 29, 1980), *published in Montana Hearing* 53.[11]

In short, the legislative history of § 1323 confirms that Congress intended to assure inholders access, notwithstanding that § 5(a) of the Wilderness Act had previously been construed by the Attorney General as permitting access to be denied if a land exchange were offered

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[10] Thus, § 1323(a) does not deprive § 5(a) of meaning. Rather, § 1323(a) only requires, as the Forest Service has long held, that § 5(a) be read as guaranteeing a private owner "adequate access" to its land unless the landowner voluntarily chooses a land exchange. Accordingly, § 1323(a) does not repeal—it clarifies—§ 5(a).

[11] Other documents in the legislative history also explain that § 1323 would remove the uncertainties over inholders' access rights created by the Attorney General's review of the issue. *E.g.*, S. Rep. No. 96-413, 310 (1979), *reprinted in* [1980] U.S. Code Cong & Adm. News, p. 5254; Letter from Ass't Att'y Gen. Parker to Rep. Seiberling at 6-7 (Sept. 5, 1980), *reprinted in* App. B to Br. for Appellee NFPA in Court of Appeals.

in lieu thereof. Thus the rule disfavoring implied repeals is inapplicable. See, *e.g.*, *United States* v. *Will*, 449 U.S. 200, 221-24 (1980) (where the language and legislative history of statutes disclose Congress' intention to repeal previously authorized salary increases for federal judges, rule against implied repeals does not apply).[12]

II. THE COURT OF APPEALS' INTERPRETATION OF § 1323(a) OF THE ALASKA LANDS ACT AS APPLYING NATIONWIDE IS PLAINLY CORRECT.

Petitioners contend that the decision of the Court of Appeals merits review because the court erroneously interpreted § 1323(a) as applying nationwide and because it relied on "the weakest of statutory interpretive criteria" in doing so. Pet. 17. We demonstrate below that, contrary to petitioners' contentions, the decision of the Court of Appeals is firmly supported by the language of § 1323(a) and other provisions of the Alaska Lands Act, as well as by the statements of knowledgeable congressmen (including the provision's sponsor) and a relevant committee during congressional consideration of the Act. Moreover, as we show, this congressional intent is confirmed by action taken by the same Congress less than a month after it had passed the Alaska Lands Act.

A. The Language of the Act Itself Reveals that Congress Intended the Provision to Apply to National Forest Lands Nationwide.

As we explained above, § 1323(a) of the Alaska Lands Act provides that, "notwithstanding any other provision of law," the Secretary of Agriculture "shall provide such access to nonfederally owned land within the boundaries

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[12] Furthermore, in addition to being without merit, MWA's claim that the decision below sanctions the repeal by implication of § 5(a) is a red herring. MWA do not dispute that § 1323(a) guarantees some inholders—those in Alaska—a right of access that cannot be defeated by the land exchange provision of § 5(a). The controversy is over whether § 1323(a) applies to National Forest System lands outside as well as inside Alaska. Thus, it is unquestioned that § 1323(a) modifies or clarifies § 5(a) to some degree.

of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof . . . ." This granted right of access is made "subject to such terms and conditions as the Secretary of Agriculture may prescribe . . .," and it is further provided that the "owner [must] comply with rules and regulations applicable to ingress and egress to or from the National Forest System." [13] Because the provision grants access to land "within the boundaries of the National Forest System"—without placing any express limitation on the location of these lands—the scope of § 1323(a) depends upon the meaning of the term "National Forest System."

The Alaska Act itself contains no definition of "National Forest System." That term is, however, statutorily defined elsewhere in Title 16 of the United States Code. Section 10(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 ("RPA"), 16 U.S.C. § 1609(a) (1976), placed into law the definition of "National Forest System." It declares that "the National Forest System consists of units of federally owned . . . lands throughout the United States and its territories, united into a nationally significant system . . . ." [14]

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[13] The full text of § 1323(a) of the Alaska Lands Act is as follows:

> "Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System." 16 U.S.C.A. § 3210(a).

[14] Section 10(a) provides:

> "Congress declares that the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united

The legislative history of § 10(a) explains that its purpose was to

> "place[] in law the definition of the lands that are considered to be a part of the system[,] [to] incorporate[] the term '*National Forest System*' into law[,] . . . [and] to state that all lands administered by the Forest Service are, in fact, part of a *National Forest System*." S. Rep. No. 93-686, 21-22 (1974) (emphases supplied).

Since adopting "National Forest System" as a defined term of art, Congress has often employed it.[15] Indeed, the legislative history of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, shows that Congress deleted a definition of "lands in the National Forest System," which had appeared in the House bill, in reliance upon the definition in § 10(a) of the RPA. H.R. Rep. No. 94-1724, 57 (1976). Accordingly, it is clear that the § 10(a) definition of "National Forest System"

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into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of this section to include all such areas into one integral system. The 'National Forest System' shall include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under Title III of the Bankhead-Jones Farm Tenant Act, and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system." 16 U.S.C. § 1609(a).

[15] For example, in addition to the definition of "National Forest System" in § 10(a) of the RPA, that Act uses the term in §§ 2-5, 8, and 9, 16 U.S.C. §§ 1601-04, 1607-08. The National Forest Management Act of 1976, 90 Stat. 2949, which amended the RPA, uses the term "National Forest System" in §§ 2-4, 6-9, 11, 14, 17, and in each instance it is clear that the term refers to federally owned forest lands nationwide. 16 U.S.C. §§ 1600-01, 1606, 1608-09, 1612, 472a, 521b.

was intended and has been employed by Congress to establish the meaning of that term for the whole body of statutes regulating national forest lands. It refers to a unified, *national* system composed of units of forest and related lands administered by the Forest Service. Thus, the use of the term "National Forest System" in § 1323 (a) indicates on the face of the statute that this access provision was meant to apply to inholdings throughout the United States.

This conclusion is supported by examination of other parts of the Alaska Lands Act, which reveals that when Congress meant to limit application of a provision to national forest lands in Alaska, it so stated. Thus, § 501 specifies particular "units of the National Forest System" which are expanded; § 505 concerns fisheries "on national forest lands *in Alaska*"; and § 708(b) prohibits judicial review of a certain environmental impact statement "with respect to National Forest System lands *in the State of Alaska*" (emphases supplied). Accordingly, had Congress intended to limit the scope of § 1323(a) to Alaska, it would have so specified, rather than referring broadly to all "nonfederally owned lands within the boundaries of the National Forest System." [16]

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[16] Petitioners contend that § 1323(b) of the Alaska Lands Act supports their reading of subsection (a) as being limited to Alaska. Subsection (b) requires the Secretary of Interior to "provide such access to nonfederally owned land surrounded by *public lands* managed by the Secretary under the Federal Land Policy and Management Act of 1976 [43 U.S.C. §§ 1701-82] as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof . . . ." 16 U.S.C.A. § 3210(b) (emphasis supplied). Petitioners contend that because § 102(3) of the Alaska Act defines the term "public lands" as certain lands situated in Alaska, subsection (b) is clearly limited to Alaska; and subsection (a)—being *in pari materia* with (b)—should be similarly limited. Pet. 15-16. This argument overlooks two important facts, however. First, as shown below, the legislative history of § 1323 shows that Congress intended both subsections to apply nationwide. Moreover, the language Congress employed in subsection (b) accomplishes

B. The Legislative History of the Alaska Lands Act Supports the Interpretation of § 1323(a) as Applying Nationwide.

Although, as petitioners correctly note, the other sections of the Alaska Lands Act pertain exclusively to Alaska, the legislative history of the Act makes clear that § 1323 was inserted to resolve a problem national in scope, and that Congress intended the solution to apply nationwide. Section 1323 was introduced in the Senate Committee on Energy and Natural Resources in October 1979 by Senator Melcher of Montana. As he later explained to his colleagues in a letter dated July 29, 1980, he introduced the provision as an amendment to the Alaska Lands Act in response to the Attorney General's consideration of the access questions posed by the Secretary of Agriculture. *Montana Hearing* 53. Because he feared that the Attorney General's opinion would result in "disrupt[ion] and confus[ion] [of] the long-standing policy of federal agencies granting access to the owners of private land surrounded by federal lands," he introduced § 1323 to ensure the "continuation of the historic policy of granting [such] access . . . ." *Id.* He stated that the Alaska Lands Bill which had been before the

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that purpose. Section 1323(b) does not refer to "public lands" generally or as defined by § 102(3); rather, it provides access to lands surrounded by "public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 [("FLPMA")] . . . ." FLPMA, in turn, defines "public lands" as "any land and interest in land owned by the United States *within the several States* and administered by the Secretary of Interior through the Bureau of Land Management," with two exceptions not relevant here. 43 U.S.C. § 1702(e) (1976) (emphasis supplied). Thus, when read in context, § 1323(b) is on its face national in scope. While it would have been preferable for the draftsmen of the Alaska Lands Act to have clarified the scope of subsection (b), subsection (a)—the provision here at issue—was clearly written to apply nationwide. Accordingly, petitioners' reliance on the ambiguity in § 1323(b) to contradict the plain meaning of § 1323(a) should be rejected.

committee already explicitly guaranteed access rights to inholders in Alaska; he said, however, that he wanted to ensure that such access was guaranteed to inholders "in all the rest of the Bureau of Land Management and National Forest lands." *Id.*

The amendment was agreed to by the committee, which explained the purpose of the provision as follows:

> "*This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands.* It has been the Committee's understanding that such owners had the right of access to their lands subject to reasonable regulation by either, the Secretary of Agriculture in the case of national forests, or by the Secretary of the Interior in the case of public lands managed by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976. However, a recent District Court decision in Utah (*Utah* v. *Andrus et al.*, C79-0037, October 1, 1979, D.C. Utah) has cast some doubt over the status of these rights. Furthermore, the Attorney General is currently reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and the Interior.
>
> ". . . .
>
> "*The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access* [*across*] *National Forests and public land*, subject, of course, to reasonable rules and regulations." S. Rep. No. 96-413, 310 (1979), *reprinted in* [1980] U.S. Code Cong. & Adm. News, p. 5254 (emphases supplied).

Because Senator Tsongas later introduced a substitute bill that would have deleted § 1323, Senator Melcher launched a campaign on the access provision's behalf. He circulated the letter referred to above to the other sena-

tors, urging them to support his attempt to retain the access provision in the Alaska Lands Act. He explained in that letter that § 1323 "was accepted by the committee without objection and it applies to landowners within federal lands (either in national forests or in public lands administered by the Bureau of Land Management) *in all of the rest of the states* where such lands are located." *Montana Hearing* 53 (emphasis supplied). Senator Melcher's efforts were successful, and the Alaska bill that passed the Senate contained § 1323. 126 Cong. Rec. S11099, S11140, S11203 (daily ed. Aug. 18 and 19, 1980).

When the Alaska bill returned to the House,[17] various statements were made in debate which indicate that it was clearly understood in that chamber that § 1323 would apply to national forest lands throughout the nation. Representative Weaver, Chairman of the Subcommittee on Forests of the House Agriculture Committee, was critical of the Senate-passed bill, among other reasons, because "[i]t has a section granting inholders on national forest and BLM lands unprecedented access rights. This provision apparently applies not only to Alaska but *also to the entire United States* . . . ." 126 Cong. Rec. H8638 (daily ed. Sept. 9, 1980) (emphasis supplied).[18] There-

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[17] The House had previously passed a different version of the Alaska Lands Bill, which contained no national access provision. 125 Cong. Rec. H3386 (daily ed. May 16, 1979).

[18] While the Senate-passed bill was pending before the House, Representative Weaver, joined by Representative Seiberling—Chairman of the House Subcommittee on Public Lands—wrote the Attorney General seeking his views on the effect of § 1323. (Letter included in Appendix B to NFPA Br. in Court of Appeals.) In that letter, the two chairmen expressed the view that the section applied nationwide: "You will note that the language of the Senate-passed provision is not limited to the State of Alaska—it covers *all* National Forest lands . . . nationwide. On its face, the provision would appear . . . to mandate 'adequate' access to all non-federal inholders in these categories of federal lands nationwide

after, several congressmen, including Representatives Udall and Seiberling, introduced an amendment to the Alaska bill that would have deleted § 1323, and described that section as a "nationwide access amendment." *Id.* at H10350 (daily ed. Oct. 2, 1980). The amendment, however, was not adopted; instead the House retained the access provision in passing the Senate version of the Alaska Lands Bill. *Id.* at H10552 (daily ed. Nov. 12, 1980). During the debates on the bill prior to passage, Representative AuCoin noted certain differences between the Senate-passed bill and the one previously passed by the House. Among others, he pointed to this access provision:

> "[T]he House bill assures owners of inholdings of reasonable access across conservation system units *in Alaska.* The bill we are to approve today grants private inholders carte blanche access across national forests and public lands *nationwide.*" *Id.* at H10529-30 (daily ed. Nov. 12, 1980) (emphases supplied).

Thus, the legislative history of the Alaska Lands Act strongly supports the Court of Appeals' conclusion that § 1323(a) applies nationwide.[19]

. . . ." In response to their letter, the Assistant Attorney General for the Office of Legislative Affairs wrote that access "rights seemingly would be 'guaranteed' to *all* inholders by this new provision . . . ." Letter of Ass't Att'y Gen. Parker at 5 (Sept. 5, 1980) (App. B to NFPA Br. in Court of Appeals) (emphasis supplied).

[19] Two conflicting statements concerning the scope of § 1323 appear in the *Congressional Record following* the enactment of the Alaska Lands Act. House Interior Committee Chairman Udall, on the day that the House acceded to the Senate-passed bill, inserted a statement in the *Congressional Record* in which he stated that it was the House's understanding that § 1323 applied only to lands in Alaska. 126 Cong. Rec. H10549 (daily ed. Nov. 12, 1980). This statement was not spoken on the floor, and there is no indication that it was made available to members prior to the House action. Moreover, it was contrary to Representative Udall's earlier (see above in text) and later (see n. 21, *infra*) understanding of the

C. This Congressional Intent Was Confirmed by the Action of the Same Congress in Deleting an Access Provision from the Colorado Wilderness Act in Reliance on § 1323 of the Alaska Lands Act.

As the Court of Appeals recognized (Pet. App. B-10 - B-12), congressional action following on the heels of the Alaska Lands Act unambiguously discloses that the 96th Congress intended § 1323 of the Alaska Lands Act to apply nationwide. In September 1980, both the Alaska Lands Bill and a bill to designate as wilderness certain National Forest System lands in Colorado and four other states (the "Colorado Wilderness Act") were pending in Congress. On September 25, 1980, the Senate passed H.R. 5487, the Colorado Wilderness Act, which contained an access provision, § 7, patterned on § 1323(a), but expressly limited to Colorado. 126 Cong. Rec. S13471-89 (daily ed. Sept. 25, 1980).[20] The House-passed bill contained no comparable access provision. 125 Cong. Rec. H11685 (daily ed. Dec. 10, 1979). The Conference Committee that was convened to resolve this and other differences determined that no access provision was necessary, because access had already been provided in the five States covered in this bill by the nationally applicable access provisions in the recently passed Alaska Lands Act. Thus, the Conference Report stated:

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provision. Finally, the Udall statement was vigorously rebutted by the author of the provision, Senator Melcher, who stated that the language was intended to apply nationwide and that he personally had met with Representatives Udall and Seiberling "to make its meaning and intent clear." *Id.* at S14770 (daily ed. Nov. 20, 1980).

[20] Section 7 provided access to "nonfederally owned lands within the boundaries of National Forest System components of the National Wilderness Preservation System in the State of Colorado . . . ." 126 Cong. Rec. S13471 (daily ed. Sept. 25, 1980). This explicit limitation of § 7 to Colorado inholdings shows that when the 96th Congress wished to draft an access provision applicable to only a portion of the inholdings within the "National Forest System," it did not merely use a generic term that could be construed as nationally applicable but, rather, expressly confined the provision to the intended portion of the "National Forest System."

"Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.

"*The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act.*" H.R. Rep. No. 96-1521, 20 (1980); 126 Cong. Rec. H11687 (daily ed. Dec. 3, 1980) (emphasis supplied).[21]

This action was further explained to both houses when considering the Conference Report. Senator Hart explained that "[t]he conference committee did not accept the Senate bill's provision on access to inholdings in Colorado wilderness areas, because Congress has recently enacted—as part of the Alaska lands bill—a similar provision to apply to access to inholdings in all public lands." 126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980).[22] Senator Armstrong stated that the "access question is one of critical concern to many westerners" and that the access provision in the Senate-passed bill "has been dropped . . . only because *even more comprehensive language is included in the Alaska Lands legislation which President*

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[21] Representative Udall, the only member of Congress to have stated that § 1323 is limited to Alaska (see note 19, *supra*), nevertheless signed this Conference Report.

[22] Senator Hart's remarks reflect his (and Congress') understanding that § 1323(b) of the Alaska Act, which guarantees access to nonfederally owned land surrounded by "public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976," also applies nationwide. Similarly, a chart placed in the *Congressional Record* by Senator Armstrong explains the rationale behind deletion of § 7 in the following way: The House-Senate conference bill includes no access provision because "[a]ccess to all USFS [United States Forest Service] and BLM [Bureau of Land Management] lands in United States is provided for by new Alaska lands legislation." 126 Cong. Rec. S15576 (daily ed. Dec. 4, 1980). See also note 23, *infra*.

Carter signed yesterday." *Id.* at S15573 (daily ed. Dec. 4, 1980) (emphasis supplied).[23] Finally, on the House side, Representative Seiberling presented the Conference Report, as quoted above, *id.* at H11683-87 (daily ed. Dec. 3, 1980); and Representative Johnson of Colorado placed in the record a "factsheet" on the conference bill which, under the heading "statutory policy issues addressed," stated: "Access (National provisions contained in Alaska Lands Bill)." *Id.* at H11705 (daily ed. Dec. 3, 1980).[24]

In summary, Congress enacted the Colorado Wilderness Act without the access provision contained in the Senate-passed bill on the express understanding that such an access provision had been rendered superfluous by enactment of § 1323 of the Alaska Lands Act. This unmistakable indication of Congress' understanding of § 1323 would be entitled to substantial weight even had different Congresses passed the Alaska Lands Act and the Colorado Wilderness Act. See *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 663-66 (1980) (by enacting the 1920

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[23] In discussing the access provision of the Alaska Lands Act, Senator Armstrong stated:

> "This access language directs both the Secretary of Agriculture and the Secretary of the Interior to provide reasonable access, including motorized air and ground access where necessary to secure the landowner reasonable use and enjoyment of his property, to private inholdings *within all national forest and BLM lands in the United States, including wilderness areas.* This language was developed by Senator John Melcher, of Montana, who worked diligently to insure its passage, so that westerners would no longer be subjected to the whims of Federal land managers who have all too frequently denied reasonable access." 126 Cong. Rec. S15573 (daily ed. Dec. 4, 1980) (emphasis supplied).

[24] The Colorado Wilderness Bill, as reported by the Conference, passed both houses. 126 Cong. Rec. H11704 (daily ed. Dec. 3, 1980); 126 Cong. Rec. S15578 (daily ed. Dec. 4, 1980). It was signed into law December 19, 1980. Pub. L. No. 96-560, 94 Stat. 3265 (Dec. 19, 1980).

Mineral Leasing Act and withdrawing oil shale from disposition under the general mining law of 1872, Congress recognized that oil shale had been a locatable mineral under the 1872 Act); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980) (legislative history of 1972 amendment to the Merchant Marine Act is entitled to significant weight in interpreting the intent of prior Congresses that enacted the Merchant Marine Act in 1936 and amended that Act in 1938). Because the *same* Congress that enacted the Colorado Wilderness Act had only days before enacted the Alaska Lands Act, the understanding of § 1323 which Congress displayed in enacting the Colorado Act *without* an access provision is entitled to virtually controlling weight. See *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 277 (1975) (meaning of the "in commerce" requirement of § 5 of the Federal Trade Commission Act is particularly relevant to proper interpretation of the "in commerce" requirement of § 7 of the Clayton Act, since both sections were enacted by the same Congress and both were designed to deal with related aspects of the same problem).[25]

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[25] MWA criticize the Court of Appeals' reliance on this evidence. Pet. 17-20. Although MWA acknowledge (Pet. 19) the correctness of the Court of Appeals' conclusion that the conferees on the Colorado Wilderness Act "had an intimate knowledge of the Alaska Lands Act" (Pet. App. B-12), MWA nevertheless maintain that the conferees' expressed understanding of § 1323 is entitled to little, if any, weight. Pet. 17-20. In making this argument, MWA rely on this Court's decision in *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980), where the Court refused to accord significant weight to (1) an isolated, casual remark of an individual congressman as to his understanding of a statute enacted four years earlier, and (2) an uncorroborated statement as to the meaning of a four-year old statute in a conference report on legislation not addressing the problem at issue. *Id.* at 116-20. These unpersuasive statements by members of a subsequent Congress are a far cry from the evidence the Court of Appeals relied on: clearly and repeatedly explained legislative action illuminating the meaning of § 1323 by the same Congress that had recently passed the Alaska Lands Act.

III. THE IMPLIED-EASEMENT AND EASEMENT-BY-NECESSITY ISSUES PRESENTED IN THE PETITION WERE NOT ADDRESSED BY THE COURT OF APPEALS AND DO NOT WARRANT THE GRANTING OF THE WRIT.

Petitioners argue that whether Burlington Northern has an implied easement under the Northern Pacific Land Grant Act of 1864 or under the common-law doctrine of easements by necessity are important questions that should be settled by this Court. Pet. 21-28.[26] Given the present posture of the case, however, these issues do not support the granting of the writ. There is no decision by the Court of Appeals on these issues; nor is there any need for this Court to reach them, since the Court of Appeals' interpretation of the Alaska Lands Act is plainly correct.

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[26] In NFPA's view, the Petition somewhat misstates the question by segregating the issue of implied easement from the issue of easement by necessity. The single question is whether the Northern Pacific Land Grant Act of 1864, informed by the then-settled common-law doctrine of easements by necessity, should be construed as granting Burlington Northern a right of access. Should certiorari be granted, NFPA will brief this issue as an alternative ground for affirmance of the judgment below.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

DAVID BOOTH BEERS *
S. ELIZABETH GIBSON
JEFFREY C. MARTIN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

RICHARD S. WASSERSTROM
1619 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-5860

Counsel for Respondent National Forest Products Association

* Counsel of Record

January 15, 1982

APPENDIX A

National Forest Products Association's Direct Member Companies and Associations

Champion International Corporation

The Cleveland-Cliffs Iron Company

Container Corporation of America

Crown Zellerbach Corporation

Georgia-Pacific Corporation

Edward Hines Lumber Company

Kirby Forest Industries, Inc.

Louisiana-Pacific Corporation

Potlatch Corporation

Southern Pacific Land Company

Weyerhaeuser Company

Willamette Industries, Inc.

Alaska Loggers Association

American Hardboard Association

American Institute of Timber Construction

American Plywood Association

American Pulpwood Association

American Wood Preservers Institute

Appalachian Hardwood Manufacturers, Inc.

California Redwood Association

Canadian Wood Council

Federal Timber Purchasers Association

Fine Hardwoods—American Walnut Association

National Hardwood Lumber Association

Fir & Hemlock Door Association

Hardwood Dimension Manufacturers Association

Hardwood Plywood Manufacturers Association

Industrial Forestry Association

Maple Flooring Manufacturers Association

National Oak Flooring Manufacturers Association

National Particleboard Association

National Woodwork Manufacturers Association

North American Wholesale Lumber Association

Northeastern Lumber Manufacturers Association

Northern Hardwood & Pine Manufacturers Association

The Railway Tie Association

Red Cedar Shingle & Handsplit Shake Bureau

Society of American Wood Preservers, Inc.

Southern Cypress Manufacturers Association

Southern Forest Products Association

Southern Hardwood Lumber Manufacturers Association

Truss Plate Institute

Western Wood Products Association

Wood Moulding & Millwork Producers

Southern Pine Inspection Bureau

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3374

D.C. No. 79-29-Bu
(District of Montana)

MONTANA WILDERNESS ASSOCIATION,
NINE QUARTER CIRCLE RANCH, and
THE WILDERNESS SOCIETY,
Plaintiffs-Appellants,

vs.

UNITED STATES FOREST SERVICE, JOHN MCGUIRE, its chief; LEWIS HAWKES, Gallatin National Forest Supervisor; UNITED STATES FISH AND WILDLIFE SERVICE; HARRY WILLOUGHBY, its regional director; BURLINGTON NORTHERN, INC., a Delaware corporation; BOB BERGLAND, Secretary of Agriculture,
Defendants-Appellees,

and

THE NATIONAL FOREST PRODUCTS ASSOCIATION,
Intervening Defendant-Appellee.

[Filed Aug. 19, 1981]

ORDER

Before: ANDERSON and NORRIS, Circuit Judges; and SCHWARZER,* District Judge.

We have carefully considered appellants' petition for rehearing, the response thereto, and appellants' reply. The petition for rehearing is granted. The opinion filed herein on May 14, 1981 is withdrawn and a new opinion is substituted.

A TRUE COPY
ATTEST 10 Sep. 1981

Clerk of Court

by: /s/ D. L. Telucci
Deputy Clerk

Opposition

3

Office - Supreme Court, U.S.
FILED
FEB 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-942

In the Supreme Court of the United States

OCTOBER TERM, 1981

MONTANA WILDERNESS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether Section 1323(a) of the Alaska National Interest Lands Conservation Act, which directs the Secretary of Agriculture to "provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof," applies only within Alaska or throughout the United States.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Andrus v. *Shell Oil Co.*, 446 U.S. 657 7

Cannon v. *University of Chicago*, 441 U.S. 677 6

Leo Sheep Co. v. *United States*, 440 U.S. 668 2

Menominee Tribe v. *United States*, 391 U.S. 404 7

NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 6-7

Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572 7

United States v. *American Building Maintenance Industries*, 422 U.S. 271 7

Utah v. *Andrus*, 486 F. Supp. 995 4

Statutes:

Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 2

Section 102(3), 94 Stat. 2375 4

Page

Statutes—Continued:

Section 505, 94 Stat. 2405 3
Section 708(b), 94 Stat. 2421 3
Section 1323, 94 Stat. 2488 ..... 5, 7
Section 1323(a), 94 Stat. 2488 ..... 2, 3, 4, 6, 7, 8, 9
Section 1323(b), 94 Stat. 2488 3-4

Colorado Wilderness Act of 1980, Pub. L. No. 96-560, 94 Stat. 3265 6

Federal Land Policy and Management Act of 1976, 43 U.S.C. 1702(e) 4

Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, Section 3(a), 91 Stat. 1244, 16 U.S.C. 1132 note 8

Northern Pacific Railroad Land Grant Act of 1864, ch. 217, 13 Stat. 365 2

Organic Act of 1897, 16 U.S.C. 478 4

Wilderness Act, Section 5(a), 16 U.S.C. 1134(a) 7-8, 9

16 U.S.C. 1609(a) 3

Miscellaneous:

126 Cong. Rec. H8638 (daily ed. Sept. 9, 1980) 5

126 Cong. Rec. S13474 (daily ed. Sept. 25, 1980) 6

126 Cong. Rec. H10350 (daily ed. Oct. 2, 1980) 5-6

Page

Miscellaneous—Continued:

126 Cong. Rec. (daily ed. Nov. 12, 1980):

pp. H10529-H10530 6

pp. H10549-H10550 7

126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980) 6

H.R. Rep. No. 96-1521, 96th Cong., 2d Sess. (1980) 6

43 Op. Att'y Gen. No. 26 (1980) 4, 8

S. Rep. No. 96-413, 96th Cong., 1st Sess. (1979) 4-5

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-942

MONTANA WILDERNESS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-25) is reported at 655 F. 2d 951. A prior opinion of the same court (Pet. App. A-1 to A-33), withdrawn by order of August 19, 1981, is unreported. The opinion of the district court (Pet. Supp. App. SA-1 to SA-35) is reported at 496 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1981. The petition for a writ of certiorari was filed on November 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As a result of a nineteenth century land grant to its predecessor (Northern Pacific Railroad Land Grant Act of 1864, ch. 217, 13 Stat. 365), respondent Burlington Northern holds land interspersed in a checkerboard fashion with the Gallatin National Forest, public land of the United States (Pet. Supp. App. SA-2 to SA-4). See generally *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 670-677 (1979). In 1979, the Forest Service gave Burlington Northern permission to construct an access road across the forest so that Burlington Northern could reach its land, which would otherwise have been inaccessible, to harvest timber. Petitioners then brought this suit in the United States District Court for the District of Montana. They sought, among other things, a declaration that the Forest Service acted unlawfully in granting the permit and an injunction prohibiting Burlington Northern from constructing the logging access road. The district court subsequently denied relief, holding that both the common law and the Northern Pacific Land Grant Act gave Burlington Northern a right of access across federal land (Pet. Supp. App. SA-7, SA-32 to SA-33).

While petitioners' appeal was pending, Congress enacted the Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371. Section 1323(a) of the Alaska Lands Act, 94 Stat. 2488, provides:

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

The court of appeals initially reversed the district court; it reasoned that Section 1323(a) applied only to lands in Alaska and that Burlington Northern was not entitled to a right of access under any other statute or the common law (Pet. App. A-19 to A-26). The court of appeals then granted respondents' petitions for rehearing, withdrew its opinion, and issued a new opinion affirming the judgment of the district court (*id.* at B-13). The court held that Section 1323(a) applied throughout the nation (Pet. App. B-5 to B-12), giving Burlington Northern "an assured right of access to its land" (*id.* at B-12). The court remanded the case for further proceedings (*id.* at B-13). It did not reach the question whether Burlington Northern had a right of access under any other statute.

ARGUMENT

While the issue presented by this case is of considerable practical importance, the court below is the first court to address the issue and its decision, in our view, is plainly correct. At least in the absence of a conflict among the circuits, review by this Court is not warranted.

1. By its terms, Section 1323(a) is not limited to Alaska; its applies to all land "within the boundaries of the National Forest System." Congress has "declare[d] that the National Forest System consists of units of federally owned forest, range, and related lands *throughout the United States and its territories* * * *" (16 U.S.C. 1609(a); emphasis added). Certain other provisions of the Alaska Lands Act are specifically limited to "National Forest System Lands in the State of Alaska" (Section 708(b), 94 Stat. 2421) and "national forest lands in Alaska" (Section 505, 94 Stat. 2405). The language of Section 1323(a), therefore, provides no support for petitioners' view.[1]

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[1]Petitioners argue (Pet. 15-20) that Section 1323(b) is limited to Alaska, and that Section 1323(a) must therefore also be so limited. But it is far from clear that Section 1323(b) is limited to Alaska. That section

The legislative history of Section 1323(a) fully confirms that Congress intended that provision to apply throughout the United States. When Section 1323(a) was enacted as part of the Alaska Lands Act, the rights of inholders like Burlington Northern were a subject of much uncertainty and debate. Attorney General Civiletti had recently issued an opinion to the Secretary of Agriculture (43 Op. Att'y Gen. No. 26 (1980)) which concluded, among other things, that neither common law rules governing easements by necessity nor the Organic Act of 1897, 16 U.S.C. 478, provides business entities like Burlington Northern a general right of access to their inholdings, although land grants or other statutes might provide such rights in particular cases. Section 1323(a) was intended to resolve this issue; the Senate committee, which added Section 1323(a) to the bill that became the Alaska Lands Act after it had passed the House without a comparable provision, explained (S. Rep. No. 96-413, 96th Cong., 1st Sess. 310 (1979)):

> This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands. * * * [A] recent District Court decision in Utah (*Utah* v. *Andrus* [486 F. Supp. 995 (1979)]) has cast some doubt over the status of these rights. Furthermore, the Attorney General is currently

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specifies that the Secretary of the Interior "shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701 *et seq.*] as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof * * *." While Section 102(3) of the Alaska Lands Act, 94 Stat. 2375, defines "public lands" as "land situated in Alaska," Congress may well have intended the term "public lands managed by the Secretary under the Federal Land Policy and Management Act" to include public lands throughout the United States; that Act applies to lands "owned by the United States within the several States" (43 U.S.C. 1702(e)).

> reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and the Interior.
>
> * * * * *
>
> The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access.

Nothing in this discussion suggests that Section 1323 applies only to Alaska; on the contrary, its purpose, its general language, and its reference to the Utah decision and the Attorney General's opinion strongly suggest that Section 1323(a) was intended to resolve the uncertainty over inholders' rights throughout the nation.

The Senate passed the bill with Section 1323 included, and the bill was returned to the House. Several Representatives expressed their understanding that Section 1323 applied throughout the nation. See, *e.g.*, 126 Cong. Rec. H8638 (daily ed. Sept. 9, 1980) (remarks of Rep. Weaver) (The Senate bill "has a section granting inholders on national forest * * * lands unprecedented access rights. This provision apparently applies not only to Alaska but also to the entire United States * * *.").[2] Opponents characterized Section 1323 as a "nationwide access" provision and

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[2]See also the letter of August 25, 1980, from Representatives Seiberling and Weaver to the Attorney General, reproduced in Appendix B to the brief filed by appellee National Forest Products Association in the court of appeals:

> Section 1323 of the Senate bill is a very broad provision. * * * [T]he language of the Senate-passed provision is not limited to the State of Alaska—it covers all National Forest lands and possibly all public lands administered by the Bureau of Land Management --nationwide.

Assistant Attorney General Parker's response to that letter, reproduced in the same appendix, does not take issue with the Representatives' understanding of Section 1323.

proposed an amendment to delete it (126 Cong. Rec. H10350 (daily ed. Oct. 2, 1980)); the amendment was not adopted. Representative AuCoin supported the bill but noted his "misgivings" about "flaws * * * [that] are serious but not fatal" and should be corrected in the future; one such "flaw" was (126 Cong. Rec. H10529-H10530 (daily ed. Nov. 12, 1980)):

> [T]he House bill assures owners of inholdings of reasonable access across conservation system units in Alaska. The bill we are to approve today grants private inholders carte blanche access across national forests and public lands nationwide.

Finally, as the court of appeals emphasized (Pet. App. B-10 to B-12), on the day after the Alaska Lands Act became law, a conference committee issued its report (H.R. Rep. No. 96-1521, 96th Cong., 2d Sess. (1980)) on the bill that became the Colorado Wilderness Act of 1980, Pub. L. No. 96-560, 94 Stat. 3265. This bill had, of course, been pending in Congress at the same time as the Alaska Lands Act. The version of the Colorado bill passed by the Senate contained an access provision that resembled Section 1323(a) of the Alaska Lands Act but applied only to "lands within the boundaries of National Forest System components of the National Wilderness Preservation System in the State of Colorado." 126 Cong. Rec. S13474 (daily ed. Sept. 25, 1980). The conference committee deleted this provision, explaining that it was doing so "because similar language has already passed Congress in section 1323 of the Alaska National Interest Lands Conservation Act." H.R. Rep. No. 96-1521, *supra*, at 20. Senator Hart reiterated in the subsequent floor debate: "Congress has recently enacted—as part of the Alaska lands bill—a similar provision to apply to access to inholdings in all public lands." 126 Cong. Rec. S15571 (daily ed. Dec. 4, 1980). This legislative history, although it occurred after the Alaska Lands Act was passed,

cannot be ignored. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 687 n.7 (1979); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Indeed, because it reflects the understanding of the same Congress that had considered and enacted Section 1323(a) only days before, it is excellent evidence of the meaning of that provision. See *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 663-666 (1980); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 277 (1975); *Menominee Tribe* v. *United States*, 391 U.S. 404, 410-411 (1968).

Petitioners rely (Pet. 19-20) on Representative Udall's statement, inserted in the Congressional Record on the day the House accepted the Senate's version of the bill, that the House understood Section 1323 to apply only to lands in Alaska (see 126 Cong. Rec. H10549-10550 (daily ed. Nov. 12, 1980)). But Representative Udall was an opponent of Section 1323—he was one of those who introduced the amendment that would have deleted Section 1323, characterizing it as a "nationwide access" provision—and his isolated statement cannot be accorded great weight in view of the language of Section 1323 and the other legislative history. Moreover, Representative Udall signed the conference report on the Colorado bill, which described Section 1323 as a provision that applied throughout the nation.

2. Petitioners also contend (Pet. 10-12) that the court of appeals erred by construing Section 1323 in a way that "repeal[s] by implication" Section 5(a) of the Wilderness Act, 16 U.S.C. 1134(a). Section 5(a) provides in part:

> In any case where * * * privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such * * * private owner shall be given such rights as may be necessary to assure adequate access to such * * * land or [the] privately owned land shall be exchanged for

> federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture * * *.

Since Section 1323(a) provides that inholders shall have a right of access "[n]otwithstanding any other provision of law," it seems unlikely that a repeal *by implication* is involved here. In any event, the court of appeals, while "recogniz[ing] a * * * tension between [Section] 1323(a) and a portion of § 5(a)" did "not decide in this case whether there is repeal by implication" because "it is arguable that the two [provisions] can stand together. * * * [Section 5(a)] could be construed to apply in the specific case of a wilderness area, and § 1323(a) could be construed to apply in all other cases" (Pet. App. B-24 to B-25). The court of appeals thus left open, for further consideration by the district court on remand, the relationship between Section 5(a) and Section 1323(a).[3] Accordingly, petitioners' claim that the court

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[3]Several questions will have to be considered. Section 5(a) gives the Secretary the option of allowing access or allowing the inholder to exchange his land for other land. See 43 Op. Att'y Gen. No. 26, *supra*, slip op. 26. Unless petitioners can show that the Secretary has abused his discretion or otherwise erred in permitting Burlington Northern to build its access road—a question the district court did not consider, because it concluded that Burlington Northern was entitled to access under the original land grant and the common law—Section 5(a) would appear to be of no assistance to petitioners. Moreover, the statute designating as wilderness study areas the areas in which Burlington Northern proposes to build its access road provides that "subject to existing private rights," this area "shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain * * * [its] presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, Section 3(a), 91 Stat. 1244, 16 U.S.C. 1132 note. Neither the district court nor the court of appeals addressed the question whether Burlington Northern's access rights are "existing private rights" within the meaning of this provision. There may also be some question whether Section 5(a) applies at all to wilderness study areas that have not yet been designated wilderness areas.

of appeals improperly interpreted Section 1323(a) to "repeal" Section 5(a) is premature at this time.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
DIRK D. SNEL
Attorneys

FEBRUARY 1982

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[4]The second and third questions presented by the petition (Pet. i) were expressly pretermitted by the court of appeals (see Pet. App. B-2, B-25 n.13), because the court correctly concluded that its construction of Section 1323(a) made it unnecessary to answer those questions. Accordingly, should the Court decide not to review the first question presented, there is no reason to review the second and third questions.

DOJ-1982-02